IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 37

BURLINGTON TRUCK LINES, INC., SANTA FE TRAIL TRANSPORTATION COMPANY, WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANSFER CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT LINES, INC., AND RINGSBY TRUCK LINES, INC.,

*Appellants,*

AND

~~GENERAL DRIVERS AND HELPERS UNION, LOCAL 554, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,~~

~~*Appellant;*~~

*vs.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND NEBRASKA SHORT LINE CARRIERS, INC.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

## JURISDICTIONAL STATEMENT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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TABLE OF CASES AND STATUTES CITED.

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## JURISDICTIONAL STATEMENT.

Appellants, Burlington Truck Lines, Inc., Illinois-California Express, Inc., Independent Truckers, Inc., Interstate Motor Freight System, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Red Ball Transfer Co.,

Ringsby Truck Lines, Inc., Santa Fe Trail Transportation Company, and Watson Bros. Transportation Co., Inc., appeal from the judgment of the United States District Court for the Southern District of Illinois, Northern Division, entered April 27, 1961, dismissing their complaint to set aside an order of the Interstate Commerce Commission, dated June 1, 1959, authorizing the performance of motor carrier operations in interstate commerce by Nebraska Short Line Carriers, Inc. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW.

The opinion of the United States District Court for the Southern District of Illinois is reported in 194 F. Supp. 31 (advance sheets). A copy of the opinion is attached as Appendix A. The report and order of the Interstate Commerce Commission is reported in 79 M. C. C. 599, and a copy is attached as Appendix B (Appendix, page 71).

## JURISDICTION.

This suit was brought under 28 U. S. C. 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on April 27, 1961, and the Notice of Appeal was filed in that court by appellants on June 23, 1961. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *American Trucking Associations, Inc.* v. *United States*, 364 U. S. 1; *Schaffer Transportation Company* v. *United States*, 355 U. S. 83; *M. & M. Transportation Co.* v. *United States*, 350 U. S. 857.

## STATUTES INVOLVED.

Sections 204(c), 207(a) and 212 of the Interstate Commerce Act (49 U. S. C. 304(c), 307(a) and 312); and Section 703 of the Labor-Management Reporting and Disclosure Act of 1959, Section 8(c); 73 Stat. 519, 29 U. S. C. 158(e).

## QUESTIONS PRESENTED.

1. Whether temporary service interruptions involving the interchange of freight between non-union motor carriers operating in interstate commerce wholly within the State of Nebraska, and some, but not all, union interstate motor carriers in a particular area arising out of a labor dispute may, consistently with the standards set forth in the Interstate Commerce Act (49 U. S. C. 201 *et seq.*) and the National Transportation Policy, be made the basis for the grant by the Interstate Commerce Commission of permanent operating authority to a non-union carrier in that area.

2. Whether the Commission erroneously used the grant of additional operating authority under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) where the appropriate remedy, if any, was a proceeding under Sections 204(c) and 212 of the Interstate Commerce Act (49 U. S. C. 304(c) and 312) to compel certain carriers to comply with their obligations under their certificates of public convenience and necessity.

## STATEMENT.

Appellants are certificated interstate motor carriers authorized to serve Omaha and other Nebraska points. Nebraska Short Line Carriers, Inc. ("Short Line"), an appellee here and the applicant before the Commission, is a Nebraska corporation organized and owned by twelve

motor carriers operating in interstate commerce wholly within the State of Nebraska. The situation involved in the case had its origin in a labor dispute between Local 554 of the International Brotherhood of Teamsters ("Union") and the twelve stockholder carriers of Short Line.

A number of small eastern Nebraska motor carriers that are not unionized use Omaha, Nebraska as the principal point at which traffic moving from and to points outside Nebraska is interchanged with larger interstate carriers. Beginning as early as 1954 the Union undertook to organize the employees of these Nebraska carriers. When its organizational activities proved unsuccessful for the most part, the Union in 1956 undertook to exert pressure upon the larger organized carriers in an effort to restrict the interchange of freight with the non-union Nebraska carriers at Omaha and some other less important Nebraska interchange points.

The larger interstate carriers are unionized and their collective bargaining agreements with the Union contained the "hot cargo" clause customary at the time, providing that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle freight produced or tendered by any person who was engaged in any labor dispute with the Union. After May, 1956, the Nebraska carriers experienced interchange difficulties with some, but not all, of the interline carriers. These interchange difficulties arose solely as a result of the labor dispute. Accordingly, in June of 1956, the Nebraska carriers organized a Nebraska corporation—Nebraska Short Line Carriers, Inc.—for the purpose of operating in interstate commerce as a motor common carrier of general commodities. In furtherance of its stated purpose, Short Line filed applications with the Interstate Commerce Commission for certificates of public

convenience and necessity. On the basis of Short Line obtaining a certificate of public convenience and necessity from the Commission, the Nebraska carriers would no longer have a need to interchange freight with the larger unionized carriers at Omaha.

On June 22, 1956, Short Line filed its first application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067, authorizing operations in interstate commerce between Denver and Chicago, Omaha and Chicago, Minneapolis and Des Moines, and Council Bluffs, Iowa and St. Louis, over regular routes serving intermediate points. By an order dated September 3, 1957, Examiner Donald R. Sutherland of the Interstate Commerce Commission recommended denial of this application (Appendix C, page 96). On January 10, 1957, Short Line filed its second application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067 (Sub No. 2), authorizing operation by it in interstate commerce between Omaha, Nebraska, on the one hand, and thirty-two states, on the other hand. By an order dated August 8, 1957, Examiner Michael B. Driscoll recommended denial of this application (Appendix D, page 165).

Although the applications were heard on separate records before different Examiners, the Interstate Commerce Commission dealt with them in a single report dated June 1, 1959 (Appendix B, page 71). Examiner Sutherland's decision was reversed in part and affirmed in part. The Commission granted a certificate to Short Line, authorizing operations "between Omaha on the one hand, and, on the other, Chicago, St. Louis and Kansas City, restricted to traffic originated at or destined to points in Nebraska" (Appendix B, pages 92-93). Examiner Driscoll's recom-

mended report and order was affirmed, and the application filed in MC-116067 (Sub No. 2) was denied.

Referring to Examiner Sutherland's recommended report and order in Docket No. MC-116067, the Commission stated that no serious dispute exists as to the facts and therefore the Examiner's statement of facts was adopted (Appendix B, page 79). Examiner Driscoll's findings were also adopted with only slight modifications (Appendix B, page 83). The Examiners' (both Sutherland and Driscoll) findings that appellants Burlington and Santa Fe provided uninterrupted service at all times were therefore adopted by the Commission (Appendix B, page 79, 83; Appendix C, page 138; Appendix D, page 169-170). These two carriers alone serve all of the points embraced within the certificate issued to Short Line (Appendix B, page 92; Appendix C, pages 135, 138). Moreover, the Commission adopted Examiner Driscoll's findings that prior to the hearing of the second application, Watson Bros. Transportation Co., Inc., Prucka Transportation, Inc. (predecessor to Interstate Motor Freight System, Inc.) and Independent Truckers, Inc. resumed normal interchange practices (Appendix B, page 79; Appendix D, page 183). In addition, the Commission adopted Examiner Sutherland's finding that only a few of Short Line's stockholders experienced any difficulty of any consequence, and that shipments moved "through to destinations" at all times even during the period of the temporary labor dispute (Appendix B, page 79; Appendix C, pages 154-155).

As a result of the Commission's grant of authority to Short Line, appellants brought a timely action to the District Court to set aside the order. The Three-Judge District Court upheld the Commission's order and dismissed the complaint with Judge Mercer dissenting.

## QUESTIONS ARE SUBSTANTIAL.

This proceeding involves the first instance in which the Commission has authorized the institution of new motor carrier operations because of temporary and partial deficiencies in service due to labor difficulties. It presents important questions concerning the considerations relevant to a Commission finding that public convenience and necessity require additional motor carrier service, and the relationship of the Commission's certification power under the Interstate Commerce Act to obligations placed upon employers by the Labor Management Relations Act, and the Commission's role in attempting to resolve labor disputes.

The facts are not in dispute, and the situation succinctly presented is a simple one: an organizational campaign conducted in Nebraska in 1956 by a Teamsters' local (Union) caused temporary disruptions in the motor carrier operations of some but not all interstate carriers serving Omaha. These temporary disruptions in service were used as the basis for an application for new interstate operating authority; and despite the fact (a) that interline service was available at all times to the Nebraska stockholder carriers (who formed Short Line) as well as to other shippers and receivers of freight in Nebraska, and (b) that the difficulties that had occurred ended in early 1957, these temporary disruptions were relied upon by the Commission to justify its finding of "present and *future* public convenience and necessity." (Emphasis ours.)

## ARGUMENT.

**A. Temporary Service Interruptions Involving the Interchange of Freight Between Non-Union Motor Carriers Operating in Interstate Commerce Wholly Within the State of Nebraska and Some But Not All Union Interstate Motor Carriers in a Particular Area Arising Out of a Labor Dispute Cannot Consistently With the Standards Set Forth in the Interstate Commerce Act (49 U. S. C. 201 et seq.) and the National Transportation Policy Be Made the Basis for the Grant of Permanent Operating Authority to a Non-Union Carrier in That Area.**

1. The purpose of section 207(a) of the Motor Carrier Act (49 U. S. C. 307(a),* under which a certificate of public convenience and necessity is sought, is to assure the public of adequate common carrier service. Its purpose is not to resolve labor disputes, nor to punish unionized carriers who engaged in good faith collective bargaining with employee

* SEC. 207. [August 9, 1935.] [49 U. S. C. § 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

representatives, nor to reward non-union carriers for carrying on a fight with a union. Despite avowals to the contrary, the Commission's decision is based upon an evaluation of a labor dispute. Some of appellants are said to have violated their duty to the public by allowing a "hot cargo" provision to be included in their collective bargaining agreements with the Union and by declining to interline with the Nebraska carriers declared to be "unfair" by the Union.

As employers in an "industry affecting commerce" appellants are subject to the obligations imposed by the Labor Management Relations Act, 29 U. S. C. 1 *et seq.* These obligations include a duty to engage in good faith collective bargaining with employee representatives on any matters relating to wages, hours and working conditions. The employees of interstate motor carriers, like those of other industries affecting commerce, are entitled to all the rights guaranteed by federal law, and they may seek to bargain concerning matters which, like the "hot cargo" clause, may affect the carrier's service. If the Commission uses its certification power to penalize motor carriers for bargaining on such matters, it exceeds its jurisdiction by employing the certification power to effect the resolution of labor disputes.

In seeking first to obtain and then to enforce the so-called "hot cargo" clauses, the Union acted pursuant to what it apparently conceived the state of the law to be under the Labor Management Relations Act. In 1956 when the occurrence at issue here took place, the National Labor Relations Board had vacillated on the legality of "hot cargo" provisions; the Interstate Commerce Commission had not yet chosen to ignore its decision in the *Montgomery Ward & Co.* v. *Consolidated Freightways*, 42 M. C. C. 225, which refused to penalize a carrier for its inability to serve premises where a strike was in progress; and there were no authoritative judicial decisions concerning the validity

and enforceability of the "hot cargo" provisions insisted upon by the Union. The "checkered career" of the "hot cargo" clause was reviewed in this Court's definitive decision in *Local 1976 v. N. L. R. B.*, 357 U. S. 93, in 1958, which resolved a conflict between several circuits in favor of the view that the provision was not enforceable. In the absence of authoritative judicial or administrative decisions a carrier, acting upon the advice of counsel, had every right to assume that hasty, ill-timed defiance of Union threats would mean a complete and legal shut down of its operations. As one of the examiners who considered the facts in the instant proceeding put it: "There is no basis for finding that these carriers were negligent or that they were not diligent in meeting this problem, because they did just what any reasonable and prudent businessman would have done in the face of these union activities" (Appendix D, page 185). Thus the Commission acted arbitrarily in granting new authority under these circumstances.

In situations such as this the Interstate Commerce Act, unlike the Labor Management Relations Act, applies only to carriers, not to their employee representatives, and, therefore, when the Interstate Commerce Commission undertakes to deal with a labor dispute it has jurisdiction over only one side, and its decisions are likely either to be ineffective or to defeat the purposes of both Acts. For example, in the instant case the existing certificated carriers have been criticized because all of them they did not resist the efforts of the Union with complete effectiveness. On the other hand on the West Coast recently a group of motor carriers followed a different procedure, banding together in August and September of 1958 for the purpose of resisting efforts of a union to enforce its demands. The result was a one month cessation of operations. Referring to this West Coast labor dispute in a recommended report and order served June 14, 1961 in *Edwin Carl Johnson*

*Common Carrier Application*, Docket No. MC-117130, which also involved an application for new operating authority, Examiner David Waters stated:

> "The evidence establishes that service ceased at Denver for a period of 32 days, and that the Industrial Commission of Colorado found that such cessation resulted from a 'lock out' by the carriers or employers and not from a 'strike' by the employees. The evidence, therefore, supports the position of Johnson. In this situation Johnson urges that his application should be granted in order that he may provide additional service and thereby insure that the public will be adequately protected for the future. The situation developed out of a labor dispute and resulted in a cessation of operations for about one month; however, the situation was settled over 2 years ago and had not occurred again up to the time of the further hearing in July 1960. Since the situation no longer exists, there is no justification for granting the application of Johnson *in order to protect the shipping public in the future from any cessation of service.* Furthermore, there can be no assurance that Johnson would be able to continue operating in a similar situation growing out of a labor dispute. To grant an application as a result of this situation, now remote, would inflict a service penalty on protestants for a breach of duty of about 1 month, and would apply a harsh remedy to a problem that no longer exists." (Emphasis ours.)

Thus, Examiner Waters of the Interstate Commerce Commission dealing with the West Coast labor dispute chooses to call the cessation of motor carrier operations which resulted from that carrier fight against a union a "breach of duty." In the instant matter, the carriers are penalized for failing to in some way compel their union employees to handle so-called "hot cargo" goods and presumably thereby risk complete and legal cessation of operations. In the *Johnson* case they are found to have been

guilty of a breach of duty for undertaking just such a fight with a union.

Even after enactment of the Landrum Griffin Act which deals with "hot cargo" clauses, a union undertook to obtain a modified "hot cargo" clause. In spite of the fact that Short Line received a certificate to serve a so-called non-union segment of the shipping public, its service has also apparently been affected by recent Teamster actions. (Appendix D, pages 190-191).[1] Whether the effect upon Short Line's service will be temporary or permanent will depend upon future action by the National Labor Relations Board and the Courts. The point is that already Short Line has been the target of union action apparently causing some disruptions in its service.

If the Commission's interpretation of Section 207 of the Interstate Commerce Act is correct, then the disruption in the service of Short Line into Chicago may be the basis for the certification of still another carrier. Since the Commission in effect has held that new carriers may be certificated to serve areas affected by labor disputes without a finding that there is an inadequacy of service, the precedent for such a certification exists. The obvious result would be the unlimited certification of carriers to meet admittedly temporary situations resulting from labor disputes despite the findings of the Examiners, which were adopted by the Commission, that the interruptions in service were temporary and that they affected only some carriers.

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1. We do not include reference to the Board's complaint against Local 710 for the purpose of raising the question of the legality of the Teamster or Short Line actions, but merely to show that Short Line like almost every other employer in the United States can have its service affected by the actions of a labor union. Short Line is not immune. The exact legality of the Teamster actions under the Labor Management Relations Act as amended in 1959 is yet to be determined. (Labor-Management Reporting and Disclosure Act of 1959, Section 8(e), Section 703(b), 73 Stat. 519, 29 U. S .C. 158(e), 73 Stat. 543.)

In using Section 207 which contemplates the permanent certification of motor carriers to meet present and future public convenience and necessity, the Commission has misapplied the Act by creating permanent carriers to meet admittedly temporary situations. The Commission thereby defeats rather than effectuates the national transportation policy which seeks to "foster sound economic conditions in transportation and among the several carriers * * *." The creation of permanent carriers to meet temporary problems will completely disrupt the delicate balance in the competitive situation which has resulted from the many decisions of the Commission evaluating permanent transportation needs. The purpose and objective of the Commission, in accordance with the standards of the statute, is to achieve an appropriate long term balance between the supply of transportation services and the needs of the shipping public. (Appendix D, pages 175-176, 184.) The intent of Congress to achieve this delicate balance in the competitive situation is defeated when the Commission makes permanent grants of authority in an attempt to remedy transitory circumstances which are clearly outside its special competence.

Before the Commission may grant a certificate of public convenience and necessity under section 207(a) of the Interstate Commerce Act, 49 U. S. C. 307(a), it is necessary to consider, among other things, (1) whether the new operation will serve a useful purpose, responsive to a public demand or need; (2) whether this purpose can and will be served as well by existing carriers; and (3) whether it can be served by the applicant for new service without endangering or impairing the operations of existing carriers contrary to the public interest. These guiding principles were stated in an early case, *Pan American Bus Lines*, 1 M. C. C. 190 (1936), and have been followed in hundreds of cases subsequently decided by the Com-

mission. Thus it is not surprising that numerous judicial decisions interpreting the Commission's responsibilities in determining whether a proposed service is required by present and future public convenience and necessity have held that a finding of the inadequacy of existing facilities is essential to support a finding of public convenience and necessity for the grant of new service, *e.g.*, *Filson* v. *I. C. C.*, 182 F. Supp. 675; *Associated Transports, Inc.* v. *United States*, 169 F. Supp. 769; *Schaffer* v. *United States*, 139 F. Supp. 444, reversed on other grounds, 355 U. S. 83; *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153, affirmed per curiam 338 U. S. 802; *McLean Trucking Co.* v. *United States*, 63 F. Supp. 829; *Inland Motor Freight* v. *United States*, 60 F. Supp. 520.

The adequacy of existing service and the effect of new service on existing carriers are relevant matters for the Commission to consider, and it cannot grant new operating authority without supportable findings on these matters unless it bases its determination of public convenience and necessity upon some other reasonable ground, such as the desirability in a particular situation of additional motor carrier competition. See *Schaffer Trans. Co.* v. *United States*, 355 U. S. 83, 90-93.

A temporary interruption in the service of some of the carriers serving an area does not justify the granting of a certificate of public convenience and necessity, unless the Commission finds that the remaining service is inadequate. It did not do so in this case. The Commission has held on a number of occasions that temporary inadequacies of service during periods of peak demand or because of emergencies do not warrant the grant of additional authority. Public convenience and necessity, the Commission has held, relates to a demand that is reasonably constant and determinable rather than to the extraordinary peaks that may arise in the course of any business. *Cater's*, 10

M. C. C. 292; *Interstate Transport*, 81 M. C. C. 751; *Southern Tank*, MC 109637 (Sub. No. 85), Aug. 27, 1959, 13 CCH Fed. Car. Cases, Par. 34,707; *Tel-Radio*, 53 M. C. C. 396.

In this case the Commission purported to base its determination of public convenience and necessity on alleged inadequacies in existing service. Yet the findings of the examiners, adopted by the Commission, demonstrate that the alleged inadequacies do not exist and that the Commission's ultimate finding is inconsistent with these specific findings. Certainly, the Commission cannot authorize new service where its own subsidiary findings affirmatively establish the adequacy of existing service.

There is no question that the temporary interchange interruptions for some but not all carriers arose as a result of a labor dispute, and that adequate transportation services were maintained in the area at all times. Not only did the Commission fail to find that service had been inadequate, but in adopting the Examiners' findings, it affirmatively found adequate service existing at all times.

**B. The Commission Mistakenly Used the Grant of Additional Operating Authority Under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a Situation Where the Appropriate Remedy, If Any, Was a Proceeding Under Sections 204(c), 212 of the Interstate Commerce Act (49 U. S. C. 304(c) and 312)* to Compel Certain Carriers to Comply With Their Obligations Under Their Certificates of Public Convenience and Necessity.**

The situation which gave rise to the filing of the Short Line applications was admittedly temporary and solely as a result of a labor dispute. Moreover only some of the carriers in the affected area were involved. Others either provided service throughout the entire period or corrected their operating difficulties before all of the hearings in the instant matter had been concluded by the Com-

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* SECTION 204

(c) Upon complaint in writing to the Commission by any person, State Board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * * *

SEC. 212. [August 9, 1935, amended June 29, 1938, September 18, 1940, August 22, 1957.] [49 U. S. C. § 312.] (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission

mission. The grant of authority by the Commission in the instant matter creates a permanent competitor for all of the carriers operating in the area. Thus even those who provided continuous service are penalized. This action by the Commission was improper.

The Commission has broad authority under sections 204(c) and 212 of the Motor Carrier Act (49 U. S. C.

promulgated thereunder or with any term, condition, or limitation of such certificate, permit or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities, between the same points or within the same territory as authorized in the permit.

304(c), 312), to compel a carrier (on complaint and after notice of hearing) to comply with the Act and with the duties and obligations imposed by its certificates of public convenience and necessity, *e.g. Montgomery Ward & Company* v. *Santa Fe Trail Transportation Co.*, 46 M. C. C. 212; *Planters Nut & Chocolate Co.* v. *American Transfer Company*, 31 M. C. C. 719. Sections 204(c) and 212 vest a wide discretion in the Commission to penalize violations of the Act and breaches of duty to the shipping public and the Commission clearly has authority to issue an affirmative order directing a carrier to fulfill its obligations under its certificate. In addition, a shipper or carrier injured by any violation of the Act by any carrier, or by a breach of the duties and obligations owed by a common carrier to the shipping public may prosecute an action for damages, *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry. Co.*, 105 F. Supp. 794, affirmed as modified, 215 F. 2d 126; *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475, or a suit to enjoin continuing unlawful conduct, *Quaker City Motor Parts Co.* v. *Interstate Motor Freight System*, 148 F. Supp. 226.

Either a complaint proceeding before the Commission or a civil action for damages or injunction would be appropriate in this case. The distinction between a sections 204(c) and 212 proceeding and a civil action for relief, on the one hand, and a section 207 proceeding on the other, is a significant one. A complaint proceeding is an adversary proceeding commenced by a complaint which must specify charges of some illegal action on the part of a named carrier or carriers. Here, a broad charge of misconduct on the part of some line-haul carriers was used as the basis for penalizing *all* carriers by the grant of competing rights to Short Line. The Commission's discretion in determining public convenience and necessity does not extend to the creation of new penalties not authorized by law.

The Commission's order in this case is inconsistent with its order in *Galveston Truck Line Corporation Extension*, 79 M. C. C. 619, decided the same day. A similar temporary disruption of service because of union activities was said to be "too remote to form a proper basis for a grant of operating rights to be exercised in the future," 79 M. C. C. 619, 622. The instant case was distinguished on the ground that the labor "difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing." The attempted distinction overlooks the fact that many of the interstate carriers in the present case never interrupted normal interchanges; that *all* interstate carriers were providing full and complete service when Short Line's related application (Sub 2 of the same docket) was heard in April, 1957; and that in both cases the labor difficulties had ceased long prior to the Commission's decision.

## CONCLUSION.

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the district court be reversed and the case remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,


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PROOF OF SERVICE.

I, DAVID AXELROD, one of the attorneys for Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify on the 18th day of August, 1961 I served copies of the foregoing Jurisdictional Statement and attached appendices on the several parties thereto, as follows:

1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid, to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record, as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554,

affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

DAVID AXELROD

*Attorney for Burlington Truck Lines, Inc., Santa Fe Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., Appellants.*

Address:
39 South La Salle Street,
Chicago 3, Illinois.
Telephone: CEntral 6-9375.

## APPENDIX A.

Burlington Truck Lines, Inc. et al.

*vs.*

United States of America and Interstate Commerce Commission.

194 F. Supp. 31 (Advance Sheets).

Before MAJOR, *Circuit Judge*, and MERCER and POOS, *District Judges*.

POOS, *D. J.*: Burlington Truck Lines, Inc., a Corporation, plaintiff, filed its complaint seeking injunctive relief against Interstate Commerce Commission and the United States to restrain the enforcement of the orders of Interstate Commerce Commission granting a limited certificate of convenience and necessity to Nebraska Short Line Carriers, Inc., in the Commission proceedings entitled, "*Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC 116067."

Jurisdiction is authorized by Title 27, U. S. Code, Sections 1336, 1398, 2284, and 2321 through 2325, inclusive, all of which authorize interested parties to seek relief from a three-judge United States District Court.

PARTIES TO PROCEEDINGS.

The intervening plaintiffs are Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Trucks, Inc., Illinois-Californi. Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines,

Inc., Ringsby Truck Lines, Inc., and General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The effect of the pleadings of interveners is to adopt the allegations and theory of the plaintiff's complaint.

Plaintiff, and all interveners, except the labor union, are common carriers by motor vehicle in interstate commerce and subject to the Interstate Commerce Act. Plaintiff is authorized to engage in transportation of general commodities to, from and between points in Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska and Wyoming, pursuant to a "Certificate of Public Convenience and Necessity," issued to it by the Interstate Commerce Commission. Its residence and principal offices are located in Galesburg, Knox County, Illinois. Watson Bros. Transportation Company, Inc., The Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., are likewise common carriers and are authorized to do business by virtue of "Certificates of Convenience and Necessity," issued by Interstate Commerce Commission to them in various proceedings and orders of the Commission. Their operations cover the States of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming, and the various business offices of these motor carriers are located at Denver, Colorado, Grand Rapids, Michigan, Omaha, Nebraska, and Salt Lake City, Utah. The application of

Nebraska Short Line Carriers was opposed before the Commission by eighteen motor and rail carriers, and the intervening plaintiffs were included. All class rail carriers in western trunkline territory likewise opposed the application, as did the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local No. 554 thereof.

NATURE OF COMPLAINT.

The complaint alleges that Nebraska Short Line Carriers, Inc., by application filed June 22, 1956, Docket No. MC 116067, sought authority from the Commission to conduct operations as a common carrier in interstate and foreign commerce in the transportation of general commodities, with certain exceptions over irregular routes, between Denver, Colorado and Chicago, Illinois; between Omaha, Nebraska and Chicago, Illinois; between Minneapolis, Minnesota and Des Moines, Iowa; between Council Bluffs, Iowa and St. Louis, Missouri; and between Lincoln, Nebraska and St. Joseph, Missouri, serving intermediate and off route points on said routes; and that by application filed January 10, 1957, Docket No. MC 116067, (Sub. No. 2), sought authority to operate as a common interstate and foreign motor carrier in the transportation of general commodities, with certain exceptions over irregular routes between Omaha, Nebraska, on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming; that in Case No. MC 116067, the hearing examiner by proposed order served September 3, 1957, recommended to the Commission that the application

be denied because Nebraska Short Line Carriers had failed to prove public convenience and necessity, and for the same reason by proposed order served August 8, 1957, in Case No. MC 116067, (Sub. No. 2) recommended that the application be denied; the Commission by order dated June 1, 1959 consolidated both cases and granted authority to applicant to operate as a common carrier by motor vehicle in the transportation of general commodities with certain exceptions over regular route between Omaha, Nebraska and Chicago, Illinois, and between Omaha, Nebraska, and St. Louis, Missouri, serving the intermediate points of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska, but denied the other application for additional rights; that by order dated March 10, 1960, the Commission denied the petitions for reconsideration and/or further hearing as filed by certain protesting carriers including the petition for reconsideration of plaintiff filed on July 27, 1959; and the complaint further alleges that the decision of the Commission is contrary to law for the same fourteen reasons, which, on analysis, challenge the jurisdiction of the Interstate Commerce Commission to enter the order in question under the law and the evidence.

### Requested Relief.

The relief prayed is for entry of a decree adjudging the orders of Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, to have been entered in violation of the Interstate Commerce Act, and therefore unlawful, null and void, and for such other relief as the court deems meet. The intervening motor carriers adopted the allegations of the complaint. Intervening plaintiff, The General Drivers and Helpers Union, Local 554, allege substantially the same matters as plaintiff, and alleged in addition that the basis for the application of Nebraska

Short Line Carriers, Inc., was a desire to protect itself from the so-called "hot-cargo clause" provision of the labor contract entered into by the union plaintiff and intervening plaintiffs' carriers.

POSITION OF DEFENDANTS AND INTERVENING DEFENDANT.

The defendants and intervening defendant, Nebraska Short Line Carriers, Inc., filed answers to the complaint, intervening carriers' complaints, and to the intervening complaint of Local 554, in and by which all factual allegations were denied and refer to and adopt the record of Interstate Commerce Commission for the complete and accurate facts and findings made by the Commission. They admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over the actions of common carriers in relation to their obligations to the public under said Act, and where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the National transportation policy; and admit that the Interstate Commerce Act does not contemplate or provide for issue of certificates of public convenience and necessity as a penalty, but say that the Act does provide for the issuance of certificates when the Commission finds that the service is, or will be required by the present or future convenience and necessity as provided in the Act; and further allege that

the evidence adduced before the Commission, and here under review, established that the present and future convenience and necessity required operation by the applicant of a common motor carrier service between the points and to the extent set forth by the order of the Commission entered in this proceeding; refer the court to the Commission's report and order of June 1, 1959, for the complete and accurate reasons and basis for the grant of the certificate in question; and lastly, they say that the challenged orders of the Commission are lawful and in all respects valid and seek a decree that the relief prayed be denied, and the complaint and intervening complaints be dismissed.

## ICC's Findings of Fact.

All parties hereto agree the findings of fact, one side of the litigants affirming these facts as justifying the orders, while the other deny that they do.

We are thus required to examine the facts and inquire, under those facts, whether or not there are substantial facts to either affirm or reject the respective orders under the applicable rules of law pertaining thereto.

The allegations of the complaint on which the plaintiff bases its right to relief, all adopted by the intervening plaintiffs, while stated in some fourteen allegations, when analyzed can be stated as based on one general proposition, namely, the questioned authority of the Commission to issue the certificate granted under the Commission's statutory power. All other asserted propositions are urged as a basis for the denial of this power.

## Scope of Judicial Review.

We are presented at the outset with the scope of judicial review of orders of the Interstate Commerce Commission. The Supreme Court, in a long line of decisions, has consistently held that orders of the Commission should not

be set aside, modified or disturbed by a court on review, if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings and are supported by substantial evidence, even though the court might reach a different conclusion on the facts presented.

This principle is clearly enunciated in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547-548; 56 L. Ed. 308, 311; 32 S. Ct. 108, wherein the Court said:

> There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow determines the validity of the exercise of the power (citing cases).
>
> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that

> its decision, involving as it does so many and such vast public interests can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-87; *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 146. The Commission's judgment is to be exercised in the light of each individual case. The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or inconsistency of decisions which it has rendered. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663-66; *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 271.

In *Virginian Ry.* v. *United States,* 272 U. S. 658, the Court said (pp. 665-666):

> • • • This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

Unless there is clear evidence to the contrary, it must be presumed that the Commission has properly performed its official duties; and this presumption supports its official acts. *United States* v. *Chemical Foundation,* 272 U. S. 1; *Baltimore & Ohio Railroad Co.* v. *United States,* 298 U. S. 349; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602.

The National Transportation Policy of Sept. 18, 1940 (49 U. S. C., preceding Sections 1, 301, 901, and 1001), provides:

> It is hereby declared to be the national transporta-

tion policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve, the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.'

Section 207(a) of the Interstate Commerce Act (49 U. S. C. 307(a)) provides in part as follows:

Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *

HISTORY OF PROCEEDING.

The admitted facts establish that Nebraska Short Line Carriers, Inc., is a corporation organized under Nebraska law on June 14, 1956, with authority to issue 1,000 shares of common and 500 shares of preferred stock at $100 per share; that at hearing time $37,500 of common stock had been issued and held in varying amounts by Romans Motor Freight and other Nebraska intrastate carriers, the officers and owners of which were experienced men and companies in the transportation business of motor common carriers, and all of whom had certificates of convenience and necessity, either from the Nebraska State Railway Commission for intrastate commerce or from Interstate Commerce Commission for interstate traffic movements. All carriers and individual owners holding stock in Nebraska Short Line Carriers, Inc., are non-union motor carriers and operate wholly within certain points in Nebraska. The Nebraska intrastate carriers are Romans Motor Freight, Clark Bros. Transfer, Lyon Transfer, McKay Freight Line, Winter Bros., Abler Transfer, Inc., Fremont Express Co., Superior Transfer, Pawnee Transfer, Derickson Transfer, Steffy's Transfer, Crete and Wilber Freight Lines, and Tillman Transfer Company. The President of applicant is John Romans, the Vice-President is C. C. McKay, the Secretary, Walter F. Clark, and the Treasurer, Royal F. Lyon, and who, with Leonard Abler, constitute the Board of Directors. Most of the stockholding truckers are authorized to transport general commodities with exceptions between certain points in eastern and central Nebraska, including Omaha and Lincoln, and between Grand Island and North Platte. Collectively they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration. The traffic manager was able to secure terminal facilities at Chicago, St. Louis, Kansas

City, Minneapolis and Denver, and found that drivers and plenty of motor vehicles could be procured for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease equipment from its stockholders or other motor carriers. The applicant, if granted authority, proposes to serve the public generally and its general manager indicated that no discrimination would be shown in selecting carriers for traffic interchange.

On January 26, 1957, applicant had total assets of $32,785; liabilities of $467; and net worth of $32,318. By order entered Dec. 4, 1956, temporary authority to applicant was approved upon meeting certain requirements.

In May, 1956, the stockholders, under their carrier rights, began to experience difficulties at Omaha, Lincoln and Grand Island, Nebraska, in respect to interstate traffic normally interchanged at those points with certain motor carriers. Romans was informed in Omaha, by an official of Independent, that the latter carrier was risking labor trouble with its employees, who are members of Teamster's Union, if normal interchange between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956, were not accepted by that carrier. These shipments were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it did not do so in every instance. Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grand Island, particularly with Red Ball and Watson. Time is consumed in finding motor carriers willing to accept traffic, and Romans' operations are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and

Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application, and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made particularly to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Burlington has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight decreased in 1956 compared to 1955 volume. His gross revenue in 1956 was $138,775, as against $159,280 in 1955. Prior to May, 1956, 30 per cent of his traffic consisted of outbound shipments, and 70 per cent was inbound. Presently most of his traffic consists of shipments moving out of the territory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prucka, taken over by Interstate Motor Freight System, Inc., Red Ball, Ringsby, Santa Fe Trail, Watson, Burlington-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl Express, Inc., Ideal Truck Line, Iowa-Nebraska Transportation Company, Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company, Wright Motor Freight Lines, now B-C Cartage, D. M. T., Haeckl, Ideal, I. N. T., McMaken, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson and Wright, respectively. These were most of the major motor carriers with whom interchange was affected (sic). After the approximate date of May 7, 1956, these

truck lines would not tender or accept freight from Romans at certain times, and this has continued. Interchange between Romans and Burlington, Santa Fe Trail and Rock Island has continued. Ringsby has also accepted freight.

Romans is non-union. There have been no strikes by his employees, nor have any pickets been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk, Nebraska. It serves Sioux City, Iowa, as well as Omaha. No terminal facilities have been operated by this carrier at Sioux City since March 15, 1956, when certain unionized connecting carriers serving that point discontinued normal interchange operations with him. Shortly thereafter the discontinuance of normal interchange began at Omaha by most of the carriers with whom he interlined freight. Burlington and Santa Fe continued to interchange traffic and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and Sturm. In June, 1955, at both Sioux City and Omaha, he interchanged 400 shipments with Watson. This dropped to nothing in 1956. In June, 1955, at the same two points, he received from 300 to 500 shipments from Freightways, and in June, 1956, he interchanged about 5 shipments with this carrier. In the first nine months of 1956, his gross revenue, including interstate and intrastate was $70,000 less than that for the corresponding period of 1955. He was approached by union representatives, beginning in August, 1955, relative to signing a contract. He was advised by one union representative that a drive was on for memberships in Nebraska and that non-union motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebraska. It operates to and from about 45 points in Nebraska, some of which are not served by any other regular route motor carrier. Service is rendered daily out of

Omaha and Lincoln. On April 17, 1956, a large number of motor carriers discontinued normal interchange with him at Lincoln and Omaha. In 1955 at these points he received 1215 interstate shipments by interline from other motor carriers, and in 1956 received only 210. Gross revenue of $205,000 in 1955 dropped to $156,000 in 1956. On some occasions his driver was permitted to pick up the necessary freight bills and shipments at certain connecting carriers' terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with him.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals $60,000, and forty per cent is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa and Crete, Nebraska.

Tillman operates between Fremont and Lincoln. In 1956, this carrier grossed about $47,000. Ten per cent of it comes from interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball and McKay.

Peters operates daily between Omaha and Fremont, and transports some interstate traffic between these points. At time of hearing he was still interchanging traffic with Prucka, Burlington and I. N. T. He still interchanges freight now and then with certain other motor carriers, but not as frequent as formerly. Merchants, for example, before April, 1956, gave him a substantial amount of traffic, but after that time very little. Also, certain traffic which he had received from Independent was given to Joe Ray Freight Line. Most of his present interstate traffic consists of shipments received in Omaha from National Car Loading Company for delivery to Fremont. He grossed about $20,800 in 1956, which compares favorably

with other years, and about 85 per cent of this revenue was derived from interstate business.

Derickson operates daily over U. S. Route 30 between Grand Island and North Platte, and interlines traffic at those points with various motor carriers without difficulty. Numerous consignees route their traffic for ultimate delivery over his line. His competitors over this route consider his service adequate.

Steffy operates over routes between Omaha and Creston, Nebraska, and between Dodge, Nebraska and Sioux City, Iowa. Some of his points on and near Nebraska Highway 91, east of Creston, are not served by any other carrier. It interchanges traffic at Omaha with various motor carriers. Its profit in 1955 amounted to about $6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh and Central City. He serves about 30 Nebraska points regularly and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters Local No. 554 to sign a contract. He inquired whether the Union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the Union to induce Lyon to sign a contract and when these attempts failed, normal interchange ceased at Omaha on March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain operators continued to interline shipments with him on a

regular basis, viz., Box Truck Lines, Inc., Burlington, Ringsby, D. M. T., and National Carloading. Prucka tendered some freight to Lyon during the last week of January 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments, but there have been instances when Lyon has not been given freight by these carriers which was routed over his line. There have been no strikes or labor disputes on Lyon's line, and no pickets were established at his place of business.

Winter operates between Omaha and Lincoln. His interstate traffic is small.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in southeastern Nebraska, including operations from Pawnee City to Lincoln, Lincoln to Beatrice, and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points in southeastern Nebraska, including operations between Superior and Hastings, Superior and Franklin, and Fairbury and Franklin. The Pawnee Transfer and Superior Transfer operations are not connected by any regular route, but these operations can be connected by the use of certain irregular route authority.

Clark operates over regular routes between Omaha, Lincoln and Sioux City, Iowa, on the one hand, and on the other, numerous points in northeastern Nebraska, including Fremont, Norfolk, Neligh, Grand Island, Newman Grove and Madison, it serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its traffic at Omaha and some at Lincoln. About 90 per cent of its traffic is transported between Omaha and Norfolk. In 1955 Clark grossed $286,346; 40 per cent from interstate, and 60 per cent from intrastate traffic. In 1956 gross revenue was $217,412; 4

per cent from interstate and 96 per cent from intrastate. Prior to September, 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955, representatives of Teamsters, (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a contract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955, a picket line was placed at Clark's Omaha terminal. Thereafter deliveries of interchange traffic to this terminal ceased generally. Clark did, where possible, deliver out-bound interchange shipments to connecting carriers. On Oct. 1, 1955, Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board. This action culminated in a settlement agreement on Dec. 7, 1955, by representatives of Local 554, Fred L. Clark, and a representative of N. L. R. B. The agreement was approved by the Regional Director of N. L. R. B. Among other things, the agreement provided for the posting of a notice at the business office of Local 554 at Omaha, which in effect stated that the Union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D. M. T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials or commodities, or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark, or to force or require Clark to recognize or bargain with the Union as the collective bargaining representative in accordance with the provisions of Section 9, of N. L. R. B. Act. This notice was placed also at various docks and terminals in Omaha. Thereafter, normal interchange with most motor carriers

was resumed for a while until Clark's interline business dropped noticeably after Jan. 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington and Wilson. Pickets, however, remained at Clark's terminal and were still there in March, 1956, including one of Clark's former employees (employed prior to Sept. 14, 1955). No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On Sept. 14, 1955, he had seven employees.

The Union activity was such that Clark sought relief from National Labor Relations Board, which Board applied for and obtained a temporary restraining order in United States District Court for Nebraska. The order of the Court, pending final determination of the matter before the Board, was calculated to enjoin picketing at the premises of various motor carriers and shippers who did business with Clark, and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where with Clark or to force or require Clark to recognize or bargain with Teamsters or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters, etc., was certified as the representative of said employees in accordance with Section 9 of National Labor Relations Act. Thereafter Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances were shown where D. M. T., Haeckel, Red Ball, Burlington and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of interstate freight have been made to certain carriers and Clark

found that the traffic was accepted in some instances and refused at other times. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments. On Dec. 26, 1956, the N. L. R. B. in the proceedings involving Clark and the Union, entered an order requiring Teamsters, Local No. 554 to cease and desist from certain unfair labor practices in violation of the National Labor Relations Act.

Generally the stockholders of applicant, with the exception of Clark, have had no dispute with their employees. They are parties to certain tariffs published by rate bureaus and have executed concurrences for the interchange of freight on through routes and through rates with various connecting motor carriers, including protesting motor carriers who are also parties to the published tariffs. They hold themselves out to transport interstate freight on a through route rate basis.

Shippers from some fourteen towns and cities in Nebraska supported the application. Shipments of drugs requiring expeditious delivery under refrigeration were delayed; rush order shipments of automotive parts were delayed. The same is true of clothing and drug shipments, butter shipments of the value of $18,000 to Chicago from a butter factory at Burwell, Nebraska, shipments of leather, newspapers, magazines, catalogues, advertising material, repair parts for farm machinery, truckload shipments of butter from Newman Grove, Nebraska, department store products, hardware store products and farm machinery parts from Sargent, Nebraska, hardware store supplies at Pierce, Nebraska, petroleum products, tires and accessories at Tilden, Nebraska, truck parts at Loup City, Nebraska, emergency shipments of auto parts at Neligh, Nebraska, tire shipments, seed, outboard motors, boats, marine hardware, plumbing fixtures, water softeners and related supplies, heating and air conditioning equipment,

and dairy products from Kansas City, Chicago, Des Moines and St. Louis to Norfolk, Nebraska, raw materials for the manufacture of farm and industrial equipment, including corn cribs, grain bins, crop-drying machines and power steering devices from Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Illinois and Hammond, Indiana, to Columbus, Nebraska, products for a chain organization located at Fairbury, Nebraska, receiving a wide range of commodities from Minneapolis, Chicago, Kansas City and St. Louis, wallpaper, floor coverings and other merchandise from St. Louis, Chicago, Lyons and Joliet, Illinois, Kansas City, Minneapolis, St. Paul and Des Moines, Iowa to Fairbury, Nebraska, pump jacks, cylinders, water supply equipment, windmills and plumbing supplies from various scattered centers over the middlewestern and rocky mountain states to Fairbury, Nebraska, drugs, department store commodities for Lincoln, Nebraska, heating and air conditioning equipment, various manufactured products, including frames for upholstered furniture, cabinets and television set bases, products for storage in two large warehouses, including products from large tobacco manufacturers and packing houses to, from and into Omaha from various centers over the country. The record is replete with delays, unnecessary tracing of shipments, inconveniences and losses, all because a former owner of Independent, testified that his Company, as a result of the fact that Romans had a labor dispute because his employees refused to be organized, was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it, that was their own responsibility."

The record further shows that Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through

or to this centrally located city. All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union.

### Hot Cargo Clause.

The Teamster contracts include what is known as a hot cargo clause, providing as follows:

> It shall not be a violation of this Agreement, and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs, or lockouts exist.
>
> The term "unfair goods" as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.
>
> The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help affect a fair settlement.
>
> The Union shall give the Employer notice of all strikes and or the intent of the Union to call a strike

of any Employer and/or place of business, and/or intent of the members to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the possession of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier.

The insistence by any employer that his employee handle unfair goods, or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such employer's operations without any need of the Union to go through the grievance procedure herein.

NATURE OF INTERCHANGE OPERATIONS.

The plaintiffs and intervening plaintiffs' carriers are large trunk line carriers, carrying freight from the entire country to the port of Omaha, and receive and interchange freight at this location from smaller carriers who operate in eastern Nebraska, in joint tariff operations. These smaller carriers use Omaha as a principal or important interchange point, and carry outgoing freight from and deliver incoming freight to a very large number of Nebraska communities. Carriage by motor freight lines furnishes the transportation facilities for most of these communities, and their normal existence depends on the uninterrupted flow of motor carriage of goods to their stores and factories. These Nebraska carriers, while smaller in the scope of their operations, adequately serve these Nebraska communities. These carriers are non-unionized.

As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in these Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Abler, were not approached until early 1956. The record shows that the Union was not very successful; that in most cases the employees did not respond, and that in every instance the carriers were more than reluctant to accept unionization.

The Union, having no satisfactory success in the Eastern Nebraska field, apparently and very probably started at the other end and began to work through the unionized carriers and put the pressure indirectly on the Eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln and Grand Island.

While some trunkline carriers did not freely admit that their interchange practices after May, 1956, had been materially different from earlier practices, some others freely admitted that they had not been able to interchange with Eastern Nebraska carriers in the same free and open way they interchanged prior to 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May, 1956, a deterioration in interchange relationships and a rise in interchange difficulties. These conclusions are heavily confirmed by the testimony and exhibits shown in this record, and no one can seriously contend that the evidence of the Nebraska carriers was not founded on actual experience. The atti-

tudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others, and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe, accepted almost all traffic offered. But even these carriers did not maintain the same free and open interchange practices in effect before May, 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not normally provide acceptable service for much or most of the traffic which these Eastern Nebraska carriers would normally have handled.

The record shows beyond doubt that so far as those Eastern Nebraska carriers were concerned, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May, 1956. And there can be no doubt that, as a direct result, these Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers, thereby causing a breakdown of service to the public. These matters have been recited above showing inconveniences, delays, loss of interstate revenues, failure of adequate service to the public, etc., all assertedly because of union pressure.

The Nebraska carriers, faced with these problems, got together and formed applicant corporation. The principal purpose of this corporation is that, as a carrier based at Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond. The applicant has no policy on unionization, but it does have a firm policy to the effect that, under no conditions,

would it ever agree to a union contract containing any hot cargo provisions.

The plea of plaintiff and intervening plaintiffs is that they have large investments in their operations, such as terminals, carriage equipment, and the like. There is likewise no doubt that their ability to perform service prior to May 1957 was adequate. The record shows that because of union pressure it was inadequate after that time, and they seek to justify it on the hot cargo clauses of their contracts with Teamsters Union. Essentially it sounds in confession and avoidance, basing their avoidance on a so-called hot cargo provision in a union contract. Nevertheless, from the examples cited in the record, Clark, in two years of operations, lost heavily. Its interstate traffic fell from 30 per cent of its total traffic in 1954, to 4 per cent in 1956. Two related shipper companies, referred to as Charadon, manufacture furniture. Sales are made in 29 states. Raw materials and supplies are received from one to several points in 23 states. The yearly volume averages 3 million pounds out, and 3.5 million pounds in. Truck service is used for 75 per cent of the outbound, and 40 to 50 per cent of the inbound. These companies had labor difficulties, and as a result had difficulty in getting trucking service for its in and out freight. These companies have been using applicant's temporary service. The Ford Storage and Moving Company and Ford Brothers have two warehouses at Omaha and one at Council Bluffs, Iowa. One principal function is to provide storage for all classes of merchandise. They normally have heavy movements of freight both in and out. From 1952 through 1956 the inbound volume ranged from the equivalent of 575 to 779 carloads. Inbound traffic originates at Chicago, Illinois; Durham, North Carolina; Cincinnati, Ohio; Sioux Falls, South Dakota; and Beloit, Wisconsin. Destinations of outbound traffic are principally

Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming and Colorado. On inbound traffic rail service has been heavily used, but there has been a growing tendency toward motor truck service. By early 1956, about 60 per cent of the volume was coming in by truck. On outbound traffic, truck service is more extensively used. Normally the shippers control inbound traffic and these companies control outbound traffic. Everything in transportation was all right there until early 1956, when the Teamsters Union began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford warehouses. They were still there at the time of the hearing. After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses, and some would not do business with these companies. In addition to the inconveniences and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All these transportation problems came directly or indirectly from labor difficulties with others which Teamsters Union supported indirectly through refusal of their members who are employees of various truck carriers to cross picket lines, although not involved in labor troubles with Truckers Union. These companies admit that prior to 1956, the truck service was satisfactory, but they support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored they would still favor applicant's service.

The Broyhill Company, operating a plant at Dakota

City for the manufacture of farm equipment, also supported the applicant. Its gross sales in 1956 ran between seven and eight hundred thousand dollars, and greater anticipated sales in 1957. Raw materials come from a number of points spread throughout 20 states. Rail service is used rather extensively on the bulkier inbound commodities, but far less extensively on the outbound traffic. About 60 per cent of outbound traffic moves in truckload lots. About 80 per cent is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of the steel union went on strike and set up picket lines. As a result of the picket lines there have been no pickup or delivery service at the plant since the line appeared. It admits that it had no transportation problem prior to March 14, 1957, and that its service has been generally satisfactory. It nevertheless supports this application upon the theory that there could be no guarantee that it would not have another strike.

LABOR PRESSURE.

These examples of shipper experience are cited to show that there were breakdowns in service because of the failure of trucking companies to serve the public through hot cargo clauses in their contracts. The trucking companies have no grievances with shippers, but because they have labor contracts with their own employees and the unions to which they belong, they take the attitude that their own labor relations should be first served to the damage and injury of the shipping public to which they owe an almost absolute duty to serve under their certificates of convenience and necessity as granted by the Interstate Commerce Commission.

There is no question about carriage by rail. It has always been adequate. The trunkline motor carriers, as a whole, have always been able to provide service to Omaha.

Were it not for the effects of union pressure upon these carriers there would have been no material problem. The origin of the problem is in labor pressure. However this may be, these carriers owe a duty to the public to accept traffic irrespective of labor pressure.

ORGANIZATION OF APPLICANT.

The Commission found that applicant was organized as a means of combatting a labor situation arising in the Spring of 1956 which threatened to deprive the Nebraska carriers of much of the interstate traffic which they, before that date, had been handling, and in fact to drive them out of business entirely; that for several years the Nebraska carriers have resisted all attempts on the part of the Teamsters Union to organize their employees; that notwithstanding the almost complete lack, on the part of their employees, for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top"; that is organizational effort should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a union shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. Their purpose was to accomplish their end by declaring Nebraska carriers "unfair," and the institution of a secondary boycott against their traffic on the part of the larger unionized carriers with which Nebraska carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to so-called "protection of rights," or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates of the Teamsters Union. Such clauses provide gen-

erally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union, or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is involved in any controversy with a union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exist. The clause is quoted above.

Also that applicant, irrespective of picket lines or other labor difficulties at plants and factories, proposes to render free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring service, regardless of picket lines.

EFFECTS OF BOYCOTT.

The Commission found that at no time has the boycott against Nebraska carriers been completely effective in that at no time has the interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from Nebraska carriers more or less regularly when offered, and to have generally maintained normal interline relationships with them. Certain others of the larger unionized carriers have accepted interline freight at times, and refused at other times. Most outbound interline traffic appears to have been disposed of by Nebraska carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the Nebraska carriers and substantial delays in the movement of freight. On inbound traffic, shipper routing instructions have been generally ignored, and much

of the interline business previously enjoyed by certain Nebraska carriers and turned over to them for ultimate delivery to points on their lines, have been turned over to the railroads and non-scheduled motor carriers with resultant delays in delivery inconvenience and added expense to shippers. The latter stems from the fact that there are no joint rates published for motor-rail movements through Omaha. On the other hand, Nebraska carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all motor traffic moving to and from Nebraska points through Omaha.

EXAMINER'S RECOMMENDATIONS: CARRIER EXCEPTIONS.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application be denied. In so doing, he suggested that an application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced by the shippers or consignees at Nebraska points served by the stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through peaceful union picket lines, amount to service deficiencies, and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which

is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

### Replies to Exceptions.

In their replies to the exceptions the opposing carriers and the Union argue generally that the conclusions of the examiner are in accordance with the law and the facts, and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor questions presented, or to circumvent the questions by the granting of additional authority such as here sought by applicant, and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the additional motor carrier service proposed, and that it is fit and able properly to conduct an operation of the scope involved.

### Commission Decision.

On June 1, 1959, the Commission, under the facts as herein set out, disagreed with the examiner's conclusions and found unanimously:

"In a situation as here presented, there arises a

question as to the proper procedure to secure corrective action. We do not agree with those who insist that the procedure here adopted, * * * the filing of the instant application under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in a service available to a large section of the public, one effective method of correcting the situation is by granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers, does not alter the situation or deprive any carrier of the right to follow the course here chosen * * * that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Neb., and Chicago, Ill., * * * and return * * * and (2) between Omaha and St. Louis, Mo., from Omaha * * * to Kansas City, Mo. * * * to St. Louis, Mo., and return over the same route * * * serving the intermediate point of Kansas City * * * restricted in each instance, to traffic originating at or destined to points in Nebraska."

ICC EXPERTISE.

The Courts, in numerous decisions, have held that the Commission has a broad discretion in determining the issue of public convenience and necessity under Section 207(a) of the Interstate Commerce Act, and the pertinent portion of the order exercising this discretion has been quoted above. This issue is a matter requiring the exercise of the Commission's expert judgment in the field of transportation. *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25; *United States* v. *Carolina Freight Carriers Corporation* [3 Federal Carriers Cases ¶ 80,023], 315 U. S. 475, 482, 490. In the exercise of this administrative function there are no specifications of consideration by which the Commission is to be governed in determining whether or not public convenience and necessity requires the inauguration of motor carrier service. We point out that this record shows, with abundant evidence, that a deficiency in service to the shipping public of Nebraska continued for over a period of two years because of transportation refusals, disregard of routings, routings by carrier and rail where no joint truck-rail rates were in existence, more expense to shippers, etc., all because of economic and labor pressure on the transportation companies involved. We also point out here that plaintiff, Burlington Truck Lines, Inc., and certain other transportation companies who continued to interchange and accept freight from the Nebraska carriers, will not be affected by this order. Their business has continued, but because of the fact, either that their transportation facilities were unable to solve the problem when considered in the overall picture, or because of the refusal of many other transportation companies to render the required service, caused the conditions to exist, is a matter for the Commission, in its discretion, to decide. These carriers have interchanged

freight from and to Nebraska points during the entire period that applicant has served under its limited temporary authority, and it is reasonable to assume that such interchange will continue in the future. If it does not continue, and even though the resulting competition causes a decrease in revenue to some of the transportation companies, the privilege granted to operate truck lines is in no sense the grant of a monopoly. This is particularly emphasized under Section 207(b) (49 U. S. C. 307(b)), which provides in substance that any certificate issued shall not confer any proprietary or property rights in the use of the public highways. There is no immunity against future competition. The record shows that the Commission considered the nature of the service rendered by plaintiff and Santa Fe during the period.

The plaintiffs argue that since Burlington and Santa Fe generally maintained normal interline relations during the period in question, and since some of the other plaintiff carriers accepted interline traffic at times, the Commission was not warranted in granting a certificate to the applicant. Although the Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599) took note of these facts, it nevertheless found that the public convenience and necessity required the operation of the applicant. Therefore, the Commission, in reaching its conclusions, took into consideration such service as those carrier continued to render during the period involved, but after weighing the evidence approved the application. Regarding this phase of the case, the Commission had this to say in its report (79 M. C. C. 599, 603):

> "At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have ac-

cepted interline traffic from the stockholder carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and non-scheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha."

This is a finding of fact, with all other facts as hereinabove related, and as found by the Commission, constitute the basis on which the Commission entered its order.

### Discretion of Administrative Body.

The Commission is vested with administrative authority "to draw its conclusions from the infinite variety of circumstances which may occur in specific instances." This is necessarily true since it is the "present or future public convenience and necessity" which the Commission must determine. While it is difficult to forecast future needs, yet the best and safest assurance in all instances is to anticipate what they might be and attempt to meet them. In order to

provide required transportation services as the demands arise, the Commission must exercise a prophetic vision. It cannot stand idly by and wait until the actual needs are present, but must foresee and take proper steps to meet them. Future need is an uncertainty in all instances. The best assurance of an accurate forecast is the considered judgment of the "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. The adequacy of the existing facilities is not the absolute criterion by which the Commission's action must be guided.

In *Norfork Southern Bus. Corp.* v. *United States* [7 Federal Carriers Cases ¶ 80,597], 96 F. Supp. 756, 760, Judge Dobie said:

> "There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service. See *Davidson Transfer & Storage Co.* v. *United States* [3 Federal Carriers Cases ¶ 80,021], DC-Pa. 42 F. Supp. 215, affirmed ('42) 317 U. S. 587; *A. B. & C. Motor Trans. Co.* v. *U. S.* [6 Federal Carriers Cases ¶ 80,376], DC-Mass., ('46) 69 F. Supp. 166, 169. Section 207(b) of the Interstate Commerce Act, 49 U. S. C. A. 307(b) stated: 'No certificate under this chapter shall confer any proprietary [redacted] property rights in the use of the public highways.'"
>
> "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. See *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35; *North Coast Transp. Co.* v. *United States*, 283 U. S. 35; *North Coast Transp. Co.* v. *United States* [4 Federal Carriers Cases ¶ 80,144], D. C. 54 F. Supp. 448, 451 affirmed 323 U. S. 668. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. *Lang Transp. Corp.* v. *United States* [6 Federal Carriers Cases ¶ 80,477], D. C., 75 F. Supp. 915, 929; *Inland*

*Motor Freight Lines* v. *United States* [2 Federal Carriers Cases ¶ 9583], D. C., 36 F. Supp. 885.

"As circuit judge Parker stated in *Beard-Laney* v. *United States* [7 Federal Carriers Cases ¶ 80,539], D. C. 83 F. Supp. 27, 32, affirmed 338 U. S. 803: 'It is for the Commission, not the Court, to say what public convenience and necessity requires and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities.'"

Moreover, in determining the question of public convenience and necessity the responsibility is that of the Commission and not that of the hearing examiner. Thus, the recommended finding of the hearing examiner that the application should be denied is not binding on the Commission. *Radio Comm.* v. *Nelson Bros.*, 289 U. S. 266, 285; *Interstate Commerce Commission* v. *Martin Bros. Box Co.*, 219 F. 2d 811, 812, cert. den., 350 U. S. 823; *Carolina Scenic Coach Co.* v. *United States* [4 Federal Carriers Cases ¶ 80,188], 56 F. Supp. 801, 805, affirmed 323 U. S. 678; *C. E. Hall & Sons* v. *United States* [7 Federal Carriers Cases ¶ 80,587], 88 F. Supp. 596, 598; *Inter-City Transp. Co.* v. *United States*, 89 F. Supp. 441, 445; *Norfolk Sou. Bus Corp.* v. *United States* [*supra*], 96 F. Supp. 756, 658, affirmed, 340 U. S. 802; *Illinois California Express, Inc., et al.* v. *United States*, [12 Federal Carriers Cases ¶ 81,183]. Under the Interstate Commerce Act, the final grant or denial of applications for operating authority is to be determined by the Commission, not by the hearing examiner.

Plaintiffs allege in their complaints "that Nebraska Short Line Carriers, Inc., failed to prove or establish by clear and convincing evidence that the public could not be or was not being served adequately by existing carriers." Plaintiffs also allege "that the decision of the Interstate Commerce Commission is based solely and entirely upon

allegations that certain shippers were unable to obtain transportation services from some carriers * * * during the period in question."

Complainants' attack in this regard appears to be directed primarily at the conclusion reached by the Commission upon the evidence. In other words, it seems that the complainants feel that the Court should weigh the evidence and reach a different conclusion from that reached by the Commission.

The considerations of the weight and value of the evidence and the inferences to be drawn therefrom are matters for the Commission alone to decide. *Alton R. Co.* v. *United States* [3 Federal Carriers Cases ¶ 80,013], 315 U. S. 15, 23; *United States* v. *Pan-American Petroleum Corp.* [1 Federal Carriers Cases ¶ 9518], 304 U. S. 156, 158; *United States* v. *Detroit Navigation Co.* [5 Federal Carriers Cases ¶ 80,256], 326 U. S. 236, 241; *United States* v. *Pierce Auto Freight Lines, Inc.* [5 Federal Carriers Cases ¶ 80,281], 327 U. S. 515, 535.

In *Riss and Co., Inc.* v. *United States* [8 Federal Carriers Cases ¶ 80,729], 100 F. Supp. 468, affirmed 342 U. S. 937, rehearing denied 343 U. S. 937, the lower court said, (p. 483):

> "The Commission is the fact-finding body. The court does not make findings of fact, but simply determines whether or not the Commission's findings are supported by substantial evidence. Although the Court and the Commission might differ with respect to the weight of the evidence, or what the evidence reveals, yet that does not give the Court the right to decide whether or not the Commission is mistaken in its findings, if there is substantial evidence upon which to base those findings. In reviewing the evidence there may be instances where our finding would be different from that of the Commission, but we have no authority to substitute our opinion for that of the

Commission, any more than an appellate court has the right to substitute its views as to the facts for that of a trial court or jury."

In *Virginian Ry. v. United States* [*supra*], 272 U. S. 658, 663, 665-666, the Supreme Court said:

"* * * To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province * * * This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it * * *"

## Issue.

The issue before the Court is simply whether there is rational basis for the Commission's findings. It is not whether this Court may have reached different findings on the record made.

## Supporting Evidence.

The hearing before the Commission consumed 19 days. The transcript of the evidence from the 75 witnesses who gave testimony consists of 2,886 pages, and there are about 175 exhibits, and we have read and studied the examiner's reports in which the evidence has been detailed and which both sides of this litigation concede to be fairly and accurately stated and from which the Commission found that there was no serious dispute as to the facts.

In the two cases pointed out by plaintiff, namely, *H. D. Filson v. Interstate Commerce Commission and United States of America et al.* [14 Federal Carriers Cases ¶ 81,316], 182 F. Supp. 675, and *Hudson Transit Lines, Inc. v. United States* [6 Federal Carriers Cases ¶ 80,503], 82 F.

Supp. 153, affirmed *per curiam* ('49) 338 U. S. 802, as sustaining its position and contentions for reversal of the Commission's order, it is pertinent to point out that both cases sustained the orders of the Commission, refusing to grant authorization for the new service. In these cases the Commission, under the evidence, found that the existing service was adequate and refused to grant the applications sought, because of failure of proof that public convenience and necessity required the new service and failed to show inadequacy of the existing service. In the latter case the Court does point out that "inadequacy of existing facilities is a basic ingredient in the determination of public 'necessity' ", and it does not mean "that the holder of a certificate is entitled to immunity from competition under any and all circumstances", and that the "introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service."

In the opinion of this Court, we find and hold that the order of the Commission is supported by substantial evidence that the service of the existing carriers, under the circumstances here involved, was inadequate, and that the proof in the record shows that the competitive service as here granted is in the public interest.

### Jurisdiction of Labor Dispute.

Another question argued in support of the complaint is that there was a labor dispute which the Commission had no power to adjudicate, the plaintiff asserting that the matter should be presented to the National Labor Relations Board, under the provisions of the National Labor Relations Act. There is no labor dispute between any employer or employee here. The only labor dispute of which the National Labor Relations Board had jurisdiction to

assume was that of Clark, and he did take his matter before that Board and had it adjudicated. As a result of his efforts the Board sought and procured injunctive relief in his behalf. It is rather pressure brought to bear on the Transportation Companies here involved by the labor union to force upon the Nebraska carriers a union shop contract, when the labor union was unable under the law to secure recognition by the Nebraska carriers by reason of their employees refusing to accept the labor union as their bargaining agent. The transportation companies more or less went along with this labor union, and did not require their employees to perform the service that these transportation companies were required to render under their certificates of convenience and necessity. They thus find themselves, by reason of their inaction, faced by public demand for additional and other service.

The plaintiffs allege in their complaints that the Commission misconceived the purpose and intention of Congress in Section 207(a) of the Interstate Commerce Act (49 U. S. C. 307(a)), which authorizes the grant of motor carrier certificates; that the Commission does not have jurisdiction to deal with labor disputes, or "to remedy alleged problems which arise as a result of labor disputes"; and that Section 212 of the Interstate Commerce Act (49 U. S. C. 312) "is the only remedy provided by said Act for wilful breaches of duty by interstate carriers", and that said Act "does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty to existing carriers alleged to have violated their duty to the public".

It is true that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organization affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but the Com-

mission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over, the actions of common carriers in relation to their obligations to the public under that Act. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission has both power and duty to authorize such additional motor carrier service as may be necessary to carry out the purposes of the national transportation policy. It is also true that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

The Commission, in its report in the proceeding here under review (79 M. C. C. 599) had this to say on that subject:

> "We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The Act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and they are obligated to

accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot bargain away their duties and obligations to the public and thereby relieve themselves of such obligations."

The plaintiffs and intervening plaintiff contend that instead of seeking motor carrier authority to serve the area involved the aggrieved parties should have filed complaints with the Interstate Commerce Commission or the National Labor Relations Board, and that the grant of a motor carrier certificate to the applicant constituted a penalty upon the plaintiff carriers which the Commission had no legal authority to impose.

These same arguments were made before the Commission in the proceeding under review, but were properly rejected as wholly without merit.

The Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599) fully disposed of these contentions by stating (pp. 612-613):

"In a situation such as that here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely, the filing of the instant applications under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situa-

tion is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen."

NEED FOR SERVICE.

Section 207 of the Interstate Commerce Act, directs the Commission, in determining applications for motor carrier certificates of public convenience and necessity, to consider both the present and future public convenience and necessity. In hearing and determining such applications, the Commission often finds that coincident with the filing of an application, existing motor carriers start to provide or offer to provide better service to more shippers. Obviously, the Commission is not required to give decisive weight to such a belated zeal to serve the public. Similarly, where existing carriers have gone so far as to subordinate their statutory common carrier service obligations to "hot cargo" clauses, the Commission, in determining the present and future public convenience and necessity, is not required to give controlling weight to a belated cessation of such conduct. It is equally obvious that in determining the public need for service between such major centers as Omaha, on the one hand, and Chicago, St. Louis and Kansas City, the fact that some of the existing carriers provided some of the needed service does not preclude authorization of additional service to insure continuous and sufficient service for all shippers.

Congress has provided limited or qualified monopolies for interstate motor common carriers on the theory that ultimately the public will receive more efficient and more

economical service. Conversely, Congress did not abandon free entry into interstate motor transportation, with its inherent safeguard of unrestricted competition, merely to protect a few authorized carriers in serving shippers with large amounts of profitable traffic, or as here, shippers and connecting carriers who have not been "blackballed" by the union with which such carriers have collective bargaining agreements. Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service.

It may be that in most cases where there has been a showing that existing motor carrier service has been inadequate, the Commission could proceed to compel the existing carriers to render adequate service to the shipping public. However, Congress has not limited the Commission to such an approach, and, in hundreds of cases, the Commission has responded to a showing of inadequate service by authorizing a new competitive service. The latter approach both conserves the Commission's regulatory resources and utilizes the beneficial forces of competition. We are aware of no basis for precluding the latter approach to the problem of inadequate service to the public where such inadequacy is created by existing carriers subordinating their public service obligations to their collective bargaining agreements.

### Justification in Refusing to Interchange.

In support of their position, the plaintiff carriers argue that they were justified in refusing to interchange shipments with other carriers and in refusing to pick up and deliver goods for shippers under the "hot cargo" clauses in their labor contracts. As will be seen from the decisions discussed below there is no merit in this contention.

The Supreme Court in its decision in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L.* v. *National Labor Relations Board*, 357 U. S. 93, stated:

> "Since the Genuine Parts decision was handed down, the Interstate Commerce Commission has in fact ruled, in *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.* [12 Federal Carriers Cases ¶ 34,179], 73 M. C. C. 617 (Dec. 16, 1957), that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.
>
> It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.
>
> But is is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods

of a shipper. Since he cannot effectively consent, there is, under Sec. 8(b)(4)(A), a 'strike or concerted refusal', and a 'forcing or requiring' of the carrier to cease handling goods just as much as if no hot cargo clause existed. But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes. Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a 'strike or concerted refusal,' or a 'forcing or requiring' of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in the manner proscribed by Sec. 8(b)(4)(A). Common factors may emerge in the adjudication of these questions involving independent considerations. This is made clear by a situation in which the carrier has freely agreed with the union to engage in a boycott. He may have failed in his obligations under the Interstate Commerce Act, but there clearly is no violation of Sec. 8(b)(4)(A); there has been no prohibited inducement of employees."

In *Pacific Gamble Robinson Co.* v. *Minneapolis & St. Louis Railway Co.*, D. C. 105 F. Supp. 794, affirmed 215 F. 2d 126, the Court held that the railroad defendant was not relieved of its duty to furnish cars to a shipper because of a strike at the latter's plant. The Court had this to say (p. 802):

"The undeniable fact is that the railroad company took no affirmative steps whatsoever to comply with its duty as a common carrier, and did nothing to insist

and demand that the strikers should not interfere with the performance of that duty * * * Instead of attempting to obey the law of the land, the defendant assumed to consider the wishes and the demands of the striking Union as being paramount. To condone defendant's failure to perform its statutory duty under this evidence would be tantamount to recognition that mob rule had supplanted law and order in this community."

Other cases to the same effect are *Erie Railroad Co.* v. *Local 1286*, 117 F. Supp. 157; *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.* [10 Federal Carriers Cases ¶ 80,879], 128 F. Supp. 475, 498; *Consolidated Freight Lines, Inc.* v. *Dept. of Public Service*, 200 Wash. 659; 94 Pac. 2d 484, 485; *Beck & Gregg Hardware Co.* v. *Cook* [10 Federal Carriers Cases ¶ 80,933], 82 S. E. 2d 4; *Burlington Transportation Co. et al.* v. *Hathaway*, 234 Iowa 135, 12 N. W. 2d 167.

In *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.* [*supra*], 128 F. Supp. 475, 498-499, the Court said:

"The labor policy of the United States cannot be conceived to authrioze setting aside obligations of others by illegal acts of unions or labor leaders. It cannot authorize violence or threats of violence, picket lines for political purposes, 'secondary' and 'tertiary' boycotts to isolate a single business from the facilities of commerce, or combinations of unions and labor leaders with business concerns such as the railroads and motor truck operators through their respective employees on the ground in line of duty to accomplish any such illegal purposes.

* * * * *

"The holding out, whether by rail or motor carrier, was not and could not be legally conditioned by any contracts which any of the carriers may have had with its own employees. Working rules or principles within the economy of the carrier would not be permitted to modify its vital obligations. Inadequacy of preparation of any carrier to carry out its engagement for hire

made in the public interest might result in the surrender or cancellation of its franchise, but not in a modification of the fundamental duties. Any conditions of this sort would have been illegal.

"The rationale of this claim as to the limitation of the 'holding out' is that the carriers are released from these duties outlined above, since the acts and omissions were those of its own employees over which it had no control because the latter indicated a sympathetic disposition not to handle or transport Wards' shipments. If followed, this theory will revolutionize the present economic structure. A group of transportation employees can bring all the rail and motor systems to a standstill by refusing to transport articles destined for another country with which the group disagrees. The same ends can be obtained by a picket line dedicated to that end, which transportation workers will not cross. These are not theories, but pragmatic present day problems. Foreign policy, governmental action, political action and the extinction of private business can be controlled by collusive interaction of employees of carriers with outside and unconnected organizations.

"The contention, if adopted, would destroy the representation of the employer by his employees dealing with the public or individuals in another line of business. It would wipe out the corporate theory."

The Court, recognizing that its earlier opinion in the *Montgomery Ward* case (128 F. Supp. 475) had been subject "to much interpretation", rendered a clarifying opinion, stated (128 F. Supp. 520):

"The opinion, reduced to its lowest terms, held that each common carrier, whether trucker or railroad, has a duty at common law and under the Interstate Commerce Act, 49 U. S. C. A. 1 *et seq.*, to receive, transport and deliver goods in accordance with its holding out or the engagement of its posted tariff. This duty is almost absolute, since the carrier is excused only if performance is prevented by the act of God or the

public enemy. Because neither of these defenses was established, liability was found as to each defendant as to specific goods."

### Right to Refuse Tendered Shipments.

It is clear, we think, from the foregoing decisions that labor disappointments such as those present here, do not constitute a valid excuse for motor carriers to refuse to pick up and deliver shipments tendered to them by shippers which are experiencing labor troubles and whose plants are picketed, or to refuse to interchange shipments with other carriers which are not unionized or are not engaged in labor controversies with their employees.

When existing motor carriers fail for any of these reasons to perform their duties and obligations to shippers and other carriers, the Commission is empowered and required to insure adequate motor carrier service through the authorization of additional and appropriate motor carrier certificates of public convenience and necessity, as was done here.

### Effect of Subsequent Legislation.

The plaintiffs and plaintiff intervenors seek to have this Court set aside the Commission's order granting motor carrier authority to the applicant on the grounds that the plaintiff carriers have now resumed the motor carrier service which they discontinued in deference to union contracts and pressures, and that Congress subsequently passed the Labor Management Reporting and Disclosure Act of 1959, commonly referred to as the Landrum-Griffin bill, Section 703 of which undertakes to outlaw "hot cargo" clauses. They contend that these developments render the issues moot.

With respect to the first contention, the Commission in its report of June 1, 1959, in the instant proceeding found

(79 M. C. C. 599, 613) that the labor difficulties in question "were continuing to be experienced up to and including the time of the hearing." Moreover, in other proceedings where the labor difficulties under consideration had actually ceased at the time of the hearing, the Commission held that the issues were not moot. *Planters Nut & Chocolate Co.* v. *American Transfer Co.* [3 Federal Carriers Cases ¶ 30,143], 31 M. C. C. 719; *Montgomery Ward & Co., Inc.* v. *Santa Fe Trail Transportation Co.* [3 Federal Carriers Cases ¶ 30,596], 42 M. C. C. 212; and *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc., et al.* [*supra*], 73 M. C. C. 617. The Commission's conclusions in this regard are supported by numerous court decisions.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, in which it was contended that the issues involving an order of the Commission were moot, the Court said (pp. 515-516):

> "• • • The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.
>
> "In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308, the object of the suit was to obtain the judgment of the court on the legality of an agreement between the railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: '• • • Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the com-

> mencement of the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by the judgment of a court under the provisions of the Act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case'." * * *

Also see *Van de Vegt* v. *Board of Commissioners*, 55 P. 2d 703, 710; and *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 448.

In *Walling, Admr. of Wage and Hour Division, U. S. Dept. of Labor* v. *Haile Gold Mines, Inc.*, 136 F. 2d 102, 105, the Court, in rejecting an argument of mootness, said:

> "It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. This is particularly true where the challenged practices are capable of repetition. Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon to act again in the same matter * * *"

MOOTNESS.

In their second argument, the plaintiffs and intervening plaintiffs, in their respective briefs, contend that the passage of the Landrum-Griffin Labor Reform Act, which purports in Section 703 thereof to outlaw "hot cargo" clauses in labor contracts, rendered moot the questions presented by the instant application, and that therefore the Commission's order granting the application should be set aside.

So far as we are aware there has been no court deter-

mination, whether or not the Act just referred to effectively outlaws "hot cargo" clauses, and many months or years may pass before there is a judicial interpretation of this Act. Even if an affirmative determination had been made, we maintain that the enactment of that legislation constitutes no basis for the voidance of the Commission's order granting the motor carrier authority in question.

There is no assurance, therefore, that the public will be protected against future cessations of motor carrier service resulting from labor difficulties such as are present here.

But completely apart from the question as to whether or not the Labor Management Reporting and Disclosure Act of 1959 effectively prohibits the type of concerted union activity which resulted here in the public being deprived of adequate transportaton service, the fact remains that the record in this case establishes that some of the plaintiff carriers have elected to ignore their obligations as common carriers and their duties under the Interstate Commerce Act until after the present application was filed. In view of this conduct on the part of these carriers, the Commission was surely justified in issuing an additional common carrier certificate so as to insure that the public will not in the future have to again suffer from inadequate transportation service in this area.

The Commission is not concerned with the contents of the contracts which the carriers have with the labor unions, but the Commission is concerned with the conduct of the carriers in serving the public, without regard to those contracts.

The intervening Union argues that granting a certificate of convenience to applicant on the basis of the non-union character of applicant and on the basis of secondary boycott activity by a union injects the Commission into the area of labor relations and collective bargaining. In answer to that the Commission says that under its jurisdic-

tion, it cannot consider whether the applicant is union or non-union; that it has no power to regulate employer or employee labor matters; that Congress has vested the power to act in such matters with the National Labor Relations Board; and that its power to act under the circumstances of this case comes from the Statute of its creation which imposes a duty to see that common carrier service is rendered to the public; and that whenever there is a failure to render the service for any reason, except an Act of God, or by the public enemy, that it can act to remedy the matter by granting authority such as granted in this case. In answering to the boycott theory it is sufficient to say that the Courts have held that such provisions in a labor contract are illegal and that Congress has now so determined. The further answer to its theory is that this record, under the facts established, shows no labor dispute between applicant and its employees, or any labor dispute that has not been corrected between the stockholder carriers and their employees. It does show an unsuccessful attempt on the part of the Union to organize the employees of the stockholder-carriers and that by its failure to so do it has effectively destroyed any jurisdiction of the National Labor Relations Board under the Act of its creation.

### Conclusion.

The facts as herein above set out, and the law as herein announced, are hereby adopted as the findings of fact and conclusions of law.

It is Therefore Ordered, Adjudged and Decreed that the Order of the Commission be, and the same is hereby affirmed, and it is further Ordered, Adjudged and Decreed that the Complaint of plaintiff, and the Complaints of Intervening Plaintiffs be, and the same are hereby dismissed for want of equity.

Judge Major, Circuit Judge, concurs in the foregoing opinion of District Judge Poos.

MERCER, DISTRICT JUDGE, DISSENTING:

I cannot agree with the decision of the majority of the court and I therefore dissent. I would hold that the order of the Commission granting the certificate of public convenience and necessity to Short Line[1] was entered in violation of the Interstate Commerce Act, 49 U. S. C. Sec. 1 et seq., and that the order is therefore null and void.

Contrary to the suggestion of the majority opinion, we are not concerned with the validity of the basic, or evidentiary, findings of fact of the Commission. Plaintiff does not challenge the evidentiary findings and the Commission and the United States are without standing to challenge the validity of their own findings. To some extent, Short Line, as an intervening defendant, has attempted to raise that issue. As a party intervener on the Commission's side of the case, Short Line is in the same boat with the Commission and must sink or swim upon the strength of the findings as they are found and incorporated in the Commission's report.

Two issues are decisive of the case at bar, namely, whether the evidentiary findings of fact of the Commission support its ultimate finding of public convenience and necessity which forms the predicative basis for the Commission order, and, whether the Commission, in entering the order in question, exceeded the power and jurisdiction conferred upon it by Section 207 of the Interstate Commerce Act, 49 U. S. C. 307. In my opinion, the order must fall on each basis.

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1. Nebraska Short Line Carriers, Inc.

### Ultimate Finding Not Supported by Evidentiary Findings.

Beyond cavil, the Commission was not bound by the findings of fact of the examiner, whether evidentiary or ultimate, but it did adopt the evidentiary findings of its hearing examiner in this case. Disagreement with its hearing examiner is limited solely to a determination that the ultimate finding and conclusion by the examiner that public convenience and necessity had not been proved was erroneous. Granted that on a mere question of naked power the Commission did have authority to adopt an ultimate finding directly opposed to that recommended by its hearing examiner, but that naked authority is tempered by the legal requirement that the ultimate findings adopted by the Commission be supported by its own evidentiary findings of fact. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474; *United States* v. *Pierce Auto Lines* [5 Federal Carriers Cases ¶ 80,281], 327 U. S. 515, 533; *I. C. C.* v. *Parker* [4 Federal Carriers Cases ¶ 80,221], 326 U. S. 60; *Southern Kansas Greyhound Lines* v. *United States* [11 Federal Carriers Cases ¶ 81,035], D. C. Mo., 134 F. Supp. 502 aff'd 351 U. S. 921; *Seaboard Air Line Railroad Co.* v. *United States* [10 Federal Carriers Cases ¶ 80,980], D. C. Va., 131 F. Supp. 129, aff'd 349 U. S. 902; *Schaffer* v. *United States* [11 Federal Carriers Cases ¶ 81,053], D. C. S. D., 139 F. Supp. 444, rev'd on other grounds, 344 U. S. 83.

This case arises out of a rather simple situation as the following summary of the findings of the Commission reveal. Its apparent complexity follows from the emotional overtones inherent in the persual of the seeming overbearing attitude of a labor union in its attempt to enforce its will upon the stockholders of Short Line.

Short Line is a corporation organized by a number of east-

ern Nebraska carriers who own all of its capital stock.[2] Those carriers are hereinafter sometimes referred to as the stockholder carriers and, individually, as Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Superior, Pawnee, Derickson, Steffy, Wilber and Tillman.

All of the stockholder carriers operate principally between points in the State of Nebraska. All are non-union. Each of them handles both local freight and interstate freight. Each maintains interchange points, principally within Nebraska, for the interchange of interstate freight with line-haul certified interstate motor carriers. Interstate freight interchange was, from time to time, made with plaintiff, Burlington, the intervening plaintiff-carriers[3] and other line-haul carriers. Hereinafter, for convenience, Burlington and the intervening plaintiff-carriers are referred to as plaintiffs, except as the context otherwise requires. Individually, the intervening plaintiff carriers are referred to as plaintiffs, except as the context otherwise requires. Individually, the intervening plaintiff carriers are referred to as Santa Fe, Watson, Red

2. These stockholder carriers are John Romans, doing business as Romans Motor Freight, Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, doing business as McKay Freight Line, Waldo W. Winter and Hubert B. Winter, doing business as Winter Bros., Abler Transfer Inc., Herbert Peters, doing business as Freemont Express Co., Henry G. Frear, doing business as (1) Superior Transfer and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Lewis Steffensmeir and Edward Steffensmeir, doing business as Steffys Transfer, Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, and Harvey Tillman, doing busines as Tillman Transfer Co.

3. Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc.

Ball, I. M. F., Independent, Illinois, I. M. L., Navajo and Ringsby, respectively, in the order in which they are listed in footnote 3.

All of the plaintiffs are union carriers, and each has a collective bargaining agreement with the Teamsters Union. At all times material to this case, each of the union contracts contained a so-called hot-cargo clause which provided that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle hot-cargo, i.e., freight produced or tendered by any person who was engaged in any labor dispute with the Teamsters or other labor union.

Beginning in 1955, the intervening plaintiff, Local 554[4] began a drive to organize common carrier employees in the eastern part of the State of Nebraska. The attempt was made to organize a part of the stockholder carriers from the top down, i.e., by persuading the carrier to enter into a union shop agreement with Local 554 under which its employees would be required to become union members. When the union drive failed, normal freight interchange with a part of the stockholder carriers was interrupted. The affected stockholder carriers experienced refusal by certain of the interstate motor carriers, who were a party to the hot-cargo agreements, to pick up freight shipped over the stockholders' lines from points in Nebraska and destined for interstate points outside that State. Some shipments into Nebraska which were routed by the consignee for terminal delivery by the stockholder carriers were diverted from that routing for terminal delivery by other motor carriers or by rail. In many instances delays were experienced by shippers in delivery of goods shipped interstate by them and routed by motor carrier, and in the

4. General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

receipt of merchandise ordered by them for interstate shipment and delivery by motor carrier. Thus, it appears, from the evidence, and the Commission found that Romans, Abler, McKay, Peters, Lyon and Clark experienced a breakdowns of interchange of freight and accompanying difficulties to varying degrees. On the other hand, neither Wilber, Tillman, Derickson, Steffy, Winter, Superior nor Pawnee ever experienced any breakdown or interruption of freight interchange.

As a result of the activities of Local 554 and the ensuing interchange interruption experienced by a part of their number, the stockholder carriers incorporated Short Line as an interstate motor carrier. The application for a certificate of public convenience and necessity was then processed with the Commission, seeking authority for Short Line to operate as an interstate carrier of general commodities, with exceptions, over regular routes between Omaha and Lincoln, Nebraska, on the one hand, and major midwest cities and Denver, Colorado, on the other.

The examiner found that the routes designated in the Short Line application were served by other certificated interstate carriers, including the plaintiffs. He also found that the equipment of plaintiffs and other carriers whose routes duplicated those requested by Short Line in its application, was not being operated to capacity and that such carriers could handle additional interstate traffic whenever the same was available. In addition to the large number of certificated motor carriers who serve the points along the routes designated in the Short Line application, the affected area is served by either the Chicago, Rock Island & Pacific Railroad, the Chicago & North Western Railway, the Chicago, Burlington & Quincy Railroad, the Missouri Pacific Railroad or the Union Pacific Railroad. Each of the named railroads appeared in opposition to the application, and each was, as the master found,

able and willing to handle less than car load shipments destined for a part of the Nebraska communities included within the area served by the stockholder carriers. In this connection, also, the examiner found that Burlington and Santa Fe were continuing to interchange freight normally with the stockholder carriers at Omaha and Lincoln on all interstate shipments originating at or destined for delivery to Nebraska points. Interchange was being effected by the affected stockholder carriers with National,[5] Ringsby, Rock Island,[6] Bos,[7] D. M. T.,[8] and Merchants.[9]

The examiner summarized his evidentiary findings on the latter phase of the case in the following language:

> "As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with stockholders named therein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging shipments with a considerable number of line-haul motor carriers. In any event, most of Peters' interchange at Omaha is effected with National Carloading. As to Abler and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D. M. T. and Merchants. As to Clark, the evidence shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder had been able to find a motor carrier willing to accept interstate shipments.

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5. National Carloading Company.
6. Rock Island Motor Transit Co.
7. Bos Truck Lines.
8. Des Moines Transportation Company, Inc.
9. Merchants Motor Freight, Inc.

"Although the shipper evidence relating to interior Nebraska points indicates that there have been some delays in transit, principally because shipments had been diverted to carriers other than those designated by the consignees, the shipments had been moving through to destination."

Again the examiner found as follows:

"On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic over their respective portions of the routes involved and the shipments are moving through to destination."

The Commission adopted the findings of the examiner, including the findings that Burlington, Santa Fe and other motor carriers were continuing normal interchange with the stockholder carriers, that the line-haul motor carriers operated over the routes proposed by Short Line and that their equipment was not used to capacity, that the line-haul carriers were enjoying the freight proposed to be handled by Short Line and that freight shipments destined to and from eastern Nebraska points were moving through to their consignment destinations.

Rather than disturbing the findings of the examiner indicative that the equipment and facilities of the certificated line-haul carriers were adequate to serve the routes sought by the Short Line application, the Commission reasoned that public convenience and necessity required allowance of the application because the breakdown of normal interchange relations with a part of the stockholder carriers constituted an abrogation by a part of the line-haul carriers of their duty to the shipping public which their certificates required. Thus, the Commission recognized that the disruption of normal interchange of freight with some of the stockholder carriers resulted from a labor dis-

pute between such stockholder carriers and Local 554. Although the Commission did not purport to decide the merits of that labor dispute, it reasoned that the certificated union carriers could not bargain away their duty to serve the public by an agreement with a labor union and thus relieve themselves of their obligations to the public as common carriers. The Commission concluded that certain of the line-haul carriers had, in reliance upon the "hot-cargo" clause of their contracts with the Teamsters Union, violated their duty as common carriers to serve the public, and that that violation had created a deficiency in motor service available to Nebraska shippers. Because of that deficiency, the Commission found that the present and future public convenience and necessity required that the Short Line application be allowed. An order was entered accordingly.

I would hold that the order be set aside for the reason that the finding of public convenience and necessity is contrary to the evidentiary findings of the Commission upon which that ultimate finding is based. Upon every application for authority to operate as a common carrier by motor vehicle between interstate points, the Commission must determine the adequacy of the facilities of existing carriers as a preface to its decision. In *Filson* v. *I. C. C.* [14 Federal Carriers Cases ¶ 81,316], D. C. Colo., 182 F. Supp. 675, the court said that "an inadequancy of existing facilities is a basic ingredient" for the determination of the existence of public necessity on a carrier certificate application. In *Hudson Transit Lines* v. *United States* [6 Federal Carriers Cases ¶ 80,503], S. D. N. Y., 82 F. Supp. 153, aff'd. 338 U. S. 802, the court held that a finding of the inadequacy of existing facilities is essential to support a finding of the Commission of public convenience and necessity for the grant of a competing carrier application. To the same effect are *Schaffer* v. *United States* [*supra*], D. C. N. D., 139 F. Supp. 444, rev'd on other

grounds, 355 U. S. 83; *Associated Transports, Inc.* v. *United States*, [13 Federal Carriers Cases ¶ 81,238], D. C. Mo., 169 F. Supp. 769; *Inland Motor Freight* v. *United States* [5 Federal Carriers Cases ¶ 80,244], D. C. Wash., 60 F. Supp. 520; *McLean Trucking Co.* v. *United States* [5 Federal Carrier Cases ¶ 80,291], D. C. N. C., 63 F. Supp. 829. In reversing the *Schaffer* case, the Supreme Court said that the relative adequacy of existing service is a significant consideration when interests of competition between carriers are being reconciled with the policy of maintaining overall sound system of transportation.

In *United States* v. *Detroit Navigation Co.* [5 Federal Carriers Cases ¶ 80,256], 326 U. S. 236, the court stressed the Commission's findings of inadequacy of existing facilities in reversing a decision setting aside a Commission order granting new operating rights. The application for proposed carriage by water of automobiles from Detroit, Michigan, to other Great Lakes ports was opposed by the Navigation Company which had been previously certified to serve the same ports. The Commission had found that the service by the Navigation Company had been inadequate in peak season because of a shortage of available ships, that most of the Navigation Company's ships were, at the time of the application, in the service of the United States as a result of World War II and that post-war production of cars would far exceed the pre-war volume which the Navigation Company had carried, which would, in turn, require added facilities. Those findings were stressed by the Court as support for the Commission's order certificating additional service in competition with the protestant.

In *Norfolk Southern Bus Corp.* v. *United States* [7 Federal Carriers Cases ¶ 80,597], D. C. Va., 96 F. Supp. 756, aff'd. 340 U. S. 802, the court did say that it was not necessary for the Commission to specifically find that existing service was inadequate before granting a certificate for

additional bus service, but that statement must be viewed against the background of the evidence in that case indicating that the service and facilities of existing carriers were inadequate.

We are not here confronted with a mere failure to find, expressly that the existing carrier facilities and service capabilities are inadequate. What we are confronted with are findings of fact adopted by the Commission which lead to only one conclusion, namely, that existing carrier facilities and service capabilities are adequate. In my opinion, the ultimate finding of public convenience and necessity for granting the Short Line operating rights is diametrically opposed to those basic findings of fact.

It is no answer to say that existing carriers do not have an absolute monopoly with respect to the routes defined in their respective certificates. Neither, in my opinion, is the fatal defect in the predicative basis of the Commission's order overcome by anything expressed in the National Transportation Policy. The Transportation Policy merely expresses congressional intent that the Commission shall have authority to maintain an integrated system of interstate transportation by balancing the competitive rights of rail, water and motor carrier facilities to fulfill the transportation needs of the public. Both the Policy and Interstate Commerce Act contemplate the granting of limited monopolies. While a carrier may not cite its certificate as a monopoly grant foreclosing the grant of competing rights, it may cite its certificate, in conjunction with evidence of its ability to render adequate service to the shipping public, as persuasive evidence against an application for competing carrier service.

Monopoly grants are tolerated to avoid ruinous competition and unnecessary duplication of service. I would hold that the monopoly rights previously granted to plaintiffs and other interstate carriers are vested rights to the extent

that those rights ought not to be ousted or diluted, except upon a finding of inadequacy of existing facilities and of a demonstrated need for competing service as an integral part of a national system of transportation.

I would declare the order under review null and void for the reason that the finding of public convenience and necessity is not supported by the Commission's basic findings of fact.

LACK OF ICC JURISDICTION TO ENTER ORDER UPON REVIEW.

The more serious aspect of this case, and an issue equally fatal, in my opinion, to the Commission's order, is the question of the jurisdiction of the Commission to enter the order under review. Upon review of the whole case I am convinced that the Commission employed the certification procedures of Section 207 of the Act, for a purpose and in a manner for which the statute was never intended. The hard core of this whole case is one fact, namely, the existence of a labor dispute between Local 554 and certain of the stockholder carriers. Any doubt as to the large effect of that fact is dispelled by reading the Commission's report. Most significant, I think, is the fact that the Commission found it necessary to devote paragraph after paragraph and several pages of its report to a discussion of the labor aspects of the case and to an explanation that it was not deciding that labor issue. In like manner, in approaching the conclusion that the order of the Commission is valid, the majority of the court devotes some 15 typewritten pages of opinion to the labor aspects of the case, to the duty of a common carrier to the public despite labor involvement and to a discussion of the lack of any decision on a labor dispute in the Commission's disposition of this case.

Moving out from the hard core of the existence of a labor dispute, the Commission concluded that plaintiff

carriers, notwithstanding their union contract and possible labor involvement, owe a duty to the public which they should not shirk. Upon that conclusion is then erected a finding that some, but not all, of the certificated interstate motor carriers breached that duty which they owed to the public by creating a disruption of normal interchange of freight and, thereby, a deficiency in motor freight service to shippers in a part of Nebraska. Upon the verdict of the guilt of a part of the interstate motor carriers hangs the finding and conclusion that public convenience and necessity requires the certification of Short Line as an additional interstate carrier to compete with plaintiffs, both the guilty and the innocent, and to compete with the rail facilities which already exist and serve the interstate needs of Nebraska shippers.

I find the suggestion that Burlington, Santa Fe, and the other interstate carriers who continued normal interchange with the stockholder carriers are not affected or injured by the order to be a completely unrealistic concept. As I have previously pointed out the Commission found that these carriers were operating at less than maximum capacity for their equipment and facilities, and that they, along with the other interstate motor carriers had been enjoying the traffic which Short Line sought by its application. The order deprives the guilty and the innocent alike of traffic which they otherwise would enjoy.

I think the evil of the order lies in a simple but very significant fact which both the Commission and the majority of this court overlook, namely, that the basic findings of the Commission's report and the evidence adduced before the hearing examiner are geared to the complaint procedures established by Section 212 of the Act, 49 U. S. C. 312, not to the procedure contemplated by the express provisions of Section 207.

The evidence adduced before the examiner tended to

prove that some, but not all, of the plaintiffs and other interstate carriers had refused to conduct normal interchange of freight destined to and from destinations within the eastern part of Nebraska. Upon that evidence the Commission rendered its verdict of guilt, making no distinction between the guilty, the semi-guilty, and the innocent. The evidence as to the effect of the disruption of normal interchange by some of the line-haul carriers tended to prove that some, but not all, of the stockholder carriers had lost business and revenue because of the decrease of interstate freight. The shipper evidence supports the finding that some shippers in the area served by the stockholder carriers had incurred increased freight charges and less efficient motor freight service as a result of disruption of normal interchange. Again, the Commission's report makes no distinction between the injured and the uninjured.

The effect of the Commission's order is a *carte blanche* decision that all interstate motor carriers operating through the interchange points used for eastern Nebraska freight are guilty, either actually or vicariously, of a breach of duty owed to the public under their operating certificates for which they would be punished by granting the Short Line application. The benefits of the granting of that application accrue not only to the stockholder carriers who were found to have been injured by the disruption of normal interchange, but, also, to the stockholder carriers who had not been injured and who, under the expressed finding of the Commission, had no complaint against the interstate carriers.

No case is cited by the Commission or by the majority of this court, and no case has been found, in which the certification procedure of Section 207 has been employed in this fashion. Cases upon which the Commission relies and which are cited by the majority of this court involved either a complaint proceeding or a civil action for injunctive

relief or for damages resulting from the failure of a carrier to render service commensurate with the obligations imposed by its status as a common carrier. *E. g., Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry. Co.*, D. C. Minn., 105 F. Supp. 794, aff'd as modified, 8 Cir., 215 F. 2d 126; *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.* [10 Federal Carriers Cases ¶ 80,879], DC-Ore., 128 F. Supp. 475.

The Commission does have the authority under Section 212 of the Act, upon any complaint, after notice and a hearing, to compel a carrier to comply with the Act and with the duties and obligations imposed by its certificate of public convenience and necessity. *E. g., Montgomery Ward & Company* v. *Santa Fe Trail Transportation Co.* [3 Federal Carriers Cases ¶ 30,596], 42 M. C. C. 212; *Planters Nut & Chocolate Co.* v. *American Transfer Company* [3 Federal Carriers Cases ¶ 30,143], 31 M. C. C. 719. Section 212 vests the Commission with a wide discretion to penalize violations of the Act and breaches of duty to the shipping public, which includes the suspension or revocation of a certificate previously granted.

The shipper or carrier injured by a violation of the Act by any carrier, or by a breach of the duties and obligations owed by a common carrier to the shipping public may prosecute an action for damages, *e. g., Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry. Co., supra, Montgomery Ward & Co.* v. *Northern Pacific Terminal Co., supra,* or a suit to enjoin continuing unlawful conduct. *E. g., Quaker City Motor Parts Co.* v. *Interstate Motor Freight System,* DC-Pa., 148 F. Supp. 226.

Either a complaint proceeding or a civil action for damages or injunction apparently would be appropriate in this case. As the examiner pointed out in his report, the evidence adduced in this case is geared to the com-

plaint situation, not to the customary certification proceeding under Section 207.

The distinction between a Section 212 proceeding and a civil action for relief, on the one hand, and Section 207 proceeding on the other, is too significant to lightly permit the latter to be used by a disgruntled carrier in discriminately as an equivalent substitute for the former. The Section 207 proceeding is an *ex parte,* although opponents of an application may appear and resist it. On the other hand, a Section 212 proceeding is an adversary action commenced by a complaint which must specify charges of some illegal action or breach of duty by a named carrier or carriers. As in litigation before the courts, the issues are squarely drawn. Due notice of the complaint and a full opportunity to appear and defend are the minimum requisites for a valid decision of the issues by the Commission. The initial burden of proof is on the complainant.

By contrast, the proceedings before the Commission in this case evince a serious, and I think unwarranted and unlawful, extension of the certification authority granted by Section 207. Here, an *ex parte* application was filed. Upon the hearing upon that application, by evidence adduced, both those stockholder carriers who claimed injury and those who, presumably, felt they might be injured in the future, converted the application into a broad charge of misconduct on the part of the line-haul carriers. I find that approach frightening enough when the question of adequacy of notice, alone, is considered. It becomes even more frightening when the evidence of misconduct of some of the line-haul carriers is made to attach vicariously and detrimentally to those carriers who conducted normal interchange.

While it cannot be doubted that the Commission does possess a large discretion to frame its decisions in a man-

ner calculated by it to implement the provisions of the Act, that discretion does not extend to the creation of a new penalty which is not expressly provided by the Act and which the framers of the Act never contemplated. In my opinion, that is what the Commission has done in this case, and its order should not be permitted to stand and become a very dangerous precedent.

Here, the Commission conceded that it was without authority to decide the merits of the dispute between Local 554 and a part of the stockholder carriers and to determine the validity of the "hot-cargo" clause. Yet it took the position that it could, nevertheless, find that a breach of duty had been perpetrated as a result of those labor questions by a part of the line-haul carriers serving eastern Nebraska, and, upon that finding, penalize all carriers in that classification by the grant of competing operating rights to Short Line. That is, I think, the crux of the true impact of the labor aspects on this case—they furnished an opportunity for the Commission to assert an authority beyond that granted by the Act.

The old axiom that "the hit dog howls" should be made to apply to this case. If Clark and others have a complaint against some or all of the line-haul carriers, they alone should do the howling. Section 212 of the Act provides them the opportunity to assert that complaint before the Commission and invoke a jurisdiction under which the issues could be decided in an appropriate proceeding. At least, until the complaint procedure has been tested, we should not permit the whole pack to come in asserting that some have been hit and claiming a right, on behalf of the pack, to a remedy which the Act was never intended to provide.

I would declare the Commission's order null and void.

## APPENDIX B.

INTERSTATE COMMERCE COMMISSION.

No. MC—116067[1].

Nebraska Short Line Carriers, Inc.,
Common Carrier Application.
Decided June 1, 1959.

79 M. C. C. 599.

REPORT OF THE COMMISSION ON ORAL ARGUMENT.

BY THE COMMISSION:

These proceedings involve related issues and will be disposed of in a single report. They were heard on separate records and each was the subject of a separate recommended order of the examiner to which it was referred. Exceptions were filed by applicant to the recommended order of the examiner in the title proceeding, and a number of rail and motor carriers operating in the affected territory replied. No exceptions were filed to the recommended order of the examiner in No. MC-116067 (Sub-No. 2) proceeding, but it was stayed by us and applicant was thereafter permitted to file a brief, to which a number of rail and motor carriers replied. Oral argument has been held. Our conclusions differ from those recommended in the title proceeding.

By application filed June 22, 1956, as amended, in the title proceeding, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign

1. This report also embraces No. MC-116067 (Sub-No. 2), Nebraska Short Line Carriers, Inc., Extension—32 States (formerly entitled Nebraska Short Line Carriers, Inc., Common Carrier Application). The title has been changed to avoid confusion.

commerce, as a common carrier by motor vehicle of general commodities, with exceptions, between the points, over the regular routes, and in the manner described in appendix A hereto.

By application filed January 10, 1957, as amended, in No. MC-116067 (Sub-No. 2), hereinafter called the Sub-2 application or proceeding, the same applicant seeks authority to transport the same commodities as in the title proceeding, over irregular routes, between Omaha, Nebr., on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. Both applications are opposed by a large number of rail and motor carriers as hereinafter described.

Applicant is a Nebraska corporation, initially organized June 14, 1956. It has an authorized capitalization of $600,000, comprised of $500,000 in preferred stock and $100,000 in common stock. At the time of the hearings herein, 1 share of preferred stock had been issued, and there had been issued and paid for in cash $37,500 in common stock. All but one-half share of the outstanding common stock is held, in varying amounts, by the following named motor carriers. The remaining one-half share is owned by one Harvey Tillman, who manages Tillman Transfer Company, which is owned by his wife, Helen L. Tillman. The stockholder-carriers are John Jack Romans, doing business as Romans Motor Freight; Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer; Royal F. Lyon, doing business as Lyon Transfer; C. C. McKay and Earl R. McKay, doing business as McKay Freight Line; Waldo W. Winter and Hubert B. Winter,

doing business as Winter Bros.; Abler Transfer, Inc.; Herbert Peters, doing business as Fremont Express Co.; Henry G. Frear, doing busienss as (1) Superior Transfer, and (2) Pawnee Transfer; John Derickson, doing business as Derickson Transfer; Louis Steffensmeir and Edward Steffensmeir, doing business as Steffy's Transfer; and Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, all of which will hereinafter be referred to collectively as the stockholders-carriers, or individually by the names under which they are doing business. As of April 4, 1957, John Jack Romans was President of the corporation, C. C. McKay was Vice President, Walter F. Clark was Secretary, and Royal F. Lyon was Treasurer, and such persons, together with Leonard Abler, of Abler Transfer Inc., were the directors of the corporation. Certain of these stockholder-carriers have heretofore conducted operations in interstate commerce, to the same extent as authorized in their Nebraska intrastate certificates, under the second proviso of section 206(a) of the Interstate Commerce Act, but they have since been granted certificates by this Commission. All are carriers of general freight operating over regular routes in eastern and central Nebraska converging upon Omaha, Lincoln, and Grand Island, Nebr., at which points they interchange traffic with other motor carriers for movement to and from points beyond Nebraska.

Applicant corporation owns no motor vehicles. It is contemplated that all vehicles initially required for the proposed operations will be leased from the stockholder-carriers or other carriers. As of January 26, 1957, applicant has assets totalling $32,785, liabilities of $467 and a net worth of $32,318. As of March 31, 1957, the net worth of the corporation had decreased to $25,825. It was granted temporary authority on December 4, 1956, for transportation as a motor common carrier of general commodities,

with exceptions, between Omaha and Chicago, serving no intermediate points, and between Omaha and St. Louis, serving the intermediate point of Kansas City except on shipments moving to or from St. Louis. As of the date of the hearing in the Sub-2 proceeding, it was operating one round trip schedule daily between Omaha and Chicago and between Omaha and Kansas City, with additional trips as needed. Operations to and from St. Louis were on a call-and-demand basis and were confined to truckload shipments pending completion of arrangements for facilities at St. Louis to handle less-than-truckload traffic. Terminal facilities were being leased at Omaha, Chicago, and Kansas City. All equipment operated was leased.

Applicant corporation was conceived and organized by the stockholder-carriers as a means of combatting a labor situation arising in the Spring of 1956, which threatened to deprive them of much of the interstate traffic which they had theretofore been handling, and, in fact, to drive them out of business entirely. For several years, the stockholder-carriers have resisted all attempts on the part of the Teamsters Union[2] to organize their employees. Notwithstanding the almost complete lack of any inclination on the part of the employees for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top", that is, that organizational efforts should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a closed-shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. This was accomplished by declaring certain of the stockholder-carriers "unfair" and the institution of a secondary

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

boycott against their traffic on the part of the larger unionized carriers with which the stockholder-carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to certain so-called "protection of rights" or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates of the Teamsters Union. Such clauses provide generally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with a Union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exists.

Commencing in the early part of May, 1956, certain of the stockholder-carriers began to experience difficulty in effecting normal interchange arrangements with the larger line-haul carriers with which they had theretofore done business. This difficulty was experienced primarily at Omaha, but also to some extent at Lincoln and Grand Island, and consisted of the refusal on the part of many of the larger carriers to accept outbound interline traffic tendered to them by the stockholder-carriers, and the refusal to turn over to the latter inbound traffic either routed over the latters' lines or which normally would have been turned over to them at Omaha and the other points named for ultimate delivery to interior Nebraska points served by them. None of the stockholder-carriers, except Clark Bros. Transfer, has ever had any dispute with its employees, and no picket lines had been established except around the Omaha terminal of Clark Bros. A picket line was established at the Clark Bros. Omaha terminal some time in Sep-

tember 1955, and all interline deliveries to the terminal ceased at that time. Four of Clark Bros.' seven employees at the Omaha terminal appear to have gone on strike initially. Clark filed charges with the National Labor Relations Board against the Union for unfair labor practices and the history of that matter is adequately described in the examiner's report.

In addition to the interline difficulties experienced by the stockholder-carriers described above, certain Omaha shippers have experienced labor difficulties resulting in the establishment of picket lines around their establishments, and the resultant refusal on the part of the organized carriers to provide pickup and delivery service thereat. If the instant applications are granted, applicant proposes to offer free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring its services, regardless of picket lines.

At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previ-

ously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha.

*The Title Proceeding.* As heretofore indicated, this application involves a proposed regular-route operation extending between Omaha, on the one hand, and, on the other, such points as Denver, Colo., Chicago, Minneapolis, Minn., and St. Louis, including service at intermediate points except in the case of a proposed alternate route between Omaha and Chicago.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced by the shippers or consignees at Nebraska points served by the stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through

peaceful union picket lines amount to service deficiencies, and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

In their replies to the exceptions, the opposing carriers and the Union[3] argue generally that the conclusions of the examiner are in accordance with the law and the facts and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor questions presented or to circumvent the questions by the granting of additional authority such as here sought by applicant, and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the

3. Separate replies were filed by Local 554 of the Teamsters Union, Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, and opposing rail carriers; and joint replies were filed (1) by Watson Bros. Transportation Co., Inc., Union Freightways, Red Ball Transfer Company, Navajo Freight Lines, Inc., Independent Truckers, Inc., Prucka Transportation Inc., H. & W. Motor Express Co., and Denver-Chicago Trucking Company, Inc., and (2) by Illinois-California Express, Inc., Interstate Motor Lines, Inc., Ringsby Truck Lines, Inc., and Pacific Intermountain Express Co.

additional motor carrier service proposed and that it is fit and able properly to conduct an operation of the scope involved.

There is no serious dispute as to the facts.[4] An examination of the record establishes that the pertinent facts are accurately and adequately stated in the report which accompanied the examiner's recommended order, and we shall adopt such statement as our own, confining our discussion herein to the issues presented by the exceptions and replies thereto.

In addition to the stockholder-carriers, the title application is supported by a large number of persons operating businesses in Nebraska who have occasion to ship or receive merchandise to or from points beyond the State and who, in many instances, are dependent upon the regularly scheduled service of the stockholder-carriers to meet their normal everyday transportation requirements. These persons represent business houses of various types at such points as Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. As a result of the breakdown of interchange arrangements at Omaha, shippers at interior Nebraska points have experienced delays in the movement of their outbound shipments to destination, and consignees at such points have experienced delays, inconveniences, and unforseen expense in connection with their inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unrouted shipments in the most logical manner, namely, over the lines of the stockholder-carriers providing daily scheduled service to their communities. When motor shipments are

4. Reference in the examiner's report to the fact that Clark Bros. Transfer had seven employees on September 14, 1955 is intended to refer to employees at the Omaha terminal only.

diverted to rail, the consignees suffer not only delays in delivery but also the additional expense of having to pay a combination of rail and motor local rates since there are no joint motor-rail rates published on such traffic through Omaha.

The difficulties of the Omaha shippers supporting the application are of a somewhat different nature. These firms, as a result of disputes with various labor organizations, have had picket lines established around their premises, and the refusal of the organized carriers to cross such picket lines has resulted in the almost complete withdrawal of motor service to their establishments. Of the three firms in this category, two have succeeded in resolving their labor disputes, at least to the extent of having the pickets withdrawn, and they were experiencing no difficulty at the time of the close of the hearings herein. The remaining firm, which operates a storage and distribution business in Omaha, with two warehouses at that point and one at Council Bluffs, Iowa, has had a Teamsters' picket line around the Omaha warehouses since May 24, 1956, and has been virtually without motor service because of the refusal of the unionized carriers to cross the picket lines. It has suffered a substantial loss of business as a result of its inability to obtain motor service for inbound deliveries and outbound distribution shipments. There is no evidence of violence or impending violence in connection with the picketing of any of these firms, and the refusal of the organized carriers to provide or attempt to provide pickup and delivery service appears to have resulted from their adherence to their "hot cargo" agreements, without regard to their obligations as common carriers.

The evidence concerning inadequate service, or lack of service, experienced by the supporting shippers is confined to shipments moving to or from points in eastern Nebraska, and there is no indication whatever of a need or professed

need for additional facilities for the movement of traffic between many of the points embraced in the application. Similarly, the service failures attributable to the breakdown of interchange arrangements appears to have occurred primarily and preponderantly as a result of the breakdown of interchange arrangements at Omaha, which is the gateway through which most of the eastern Nebraska traffic flows. As to origins and destinations beyond Nebraska, the evidence is concerned primarily with traffic moving to and from Des Moines, Minneapolis, Chicago, St. Louis, and Kansas City. There is no evidence of any substantial need for service to and from Denver or St. Joseph, Mo., which points were mentioned by a few of the supporting shippers. The application contains no practicable routing for the movement of freight between Omaha and Des Moines, and there is no satisfactory explanation as to why traffic moving between eastern Nebraska points and Minneapolis could not be routed through the Sioux City, Iowa, gateway, and thus bypass the Omaha interchange. Considering all of the evidence presented, therefore, it would appear to establish a need for additional motor service within the scope of the instant application between Omaha, on the one hand, and, on the other, Chicago, St. Louis, and Kansas City, restricted to traffic originating at or destined to points in Nebraska.

Evidence in opposition to the application was submitted on behalf of Burlington Truck Lines, Inc., Santa Fe Trial Transportation Company, Denver-Chicago Trucking Company, Inc., Union Freightways, Illinois-California Express, Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Red Ball Transfer Company, Ringsby Truck Lines, Inc., Watson Bros. Transportation Co., Inc., and a number of rail carriers. All of the named motor carriers, except Pacific Intermountain Express and Denver-Chicago,

serve Omaha. Of those serving Omaha, Burlington Truck, Union Freightways, Illinois-California, Independent Truckers, Interstate, Navajo, Red Ball, Ringsby, and Watson Bros. operate between Omaha and Chicago. Five of the above named carriers, Red Ball, Watson Bros., Union Freightways, Burlington Truck, and Santa Fe Trail, operate between Omaha and Kansas City; Watson Bros., Union Freightways, and Burlington Truck operate between Omaha and St. Louis; Watson Bros. and Union Freightways operate between Omaha and Minneapolis; and Watson operates between Omaha and Des Moines. All of the opposing railroads serve Omaha, and, either directly or through their connections, serve all principal points on the routes involved in the instant application.

*The Sub-2 Application.* By this application, applicant seeks authority to transport general freight between Omaha and all points in 32 States. As in the title proceeding, the application is based upon an alleged inadequacy of existing motor service by reason of the refusal of most of the organized carriers serving Omaha to interchange traffic with the stockholder-carriers and their refusal to provide pickup and delivery service at the establishments of certain Omaha firms at which union picket lines have been established.

The examiner found that applicant had failed to establish that public convenience and necessity require the operation for which authority is sought, and recommended that the application be denied. As heretofore indicated, no exceptions were filed to the recommended order, but applicant was permitted to file a brief after the service of the order and the opposing carriers replied thereto. In its brief, applicant argues that it has met its burden of proving a need on the part of the public for the service proposed; that the granting of the authority sought is necessary in order to insure adequate transportation fa-

cilities to a substantial portion of the shipping public of Nebraska; that it is fit, willing, and able properly to provide the service shown to be required; and that it is the primary duty of the Commission to develop a national transportation system adequate to meet the needs of the commerce of all parts of the country. In their replies, the opposing carriers urge that applicant has failed to establish a need for any substantial portion of the service proposed; that it has failed to provide any convincing evidence that it is able, financially and otherwise, to conduct an operation of the scope suggested; that existing rail and motor services have not been shown to be inadequate; that any inadequacies experienced by the supporting shippers are attributable to labor difficulties over which this Commission has no jurisdiction; that any grievances which the stockholder-carriers or the shipping public may have against existing carriers should be made the subject of a complaint proceeding rather than an application for additional operating rights such as here involved; and that the authority of the Commission to grant new operating authority should not be used to circumvent labor disputes or cure temporary service deficiencies resulting therefrom.

The pertinent facts of record are adequately stated in the report which accompanied the examiner's recommended order and we adopt such statement, as hereinafter augmented or modified, as our own.

In spite of the broad territorial scope of the application, and the voluminous testimony adduced from the stockholder-carriers concerning their inability to effect normal interchange arrangements with a number of the organized carriers serving Omaha, very little evidence was submitted in this proceeding on behalf of persons or firms having occasion to make shipments through the Omaha gateway. Representatives of only six shippers appeared in support of the application. Of these, the Omaha Parlor

Frame Company,[5] which is engaged in the manufacture of wooden furniture at Omaha, was experiencing no transportation difficulties at the time of the hearing herein, and testimony submitted in its behalf as to a need for additional motor service need not further be considered. The Broyhill Company manufactures farm equipment at its plant at Dakota City, Nebr., which is about 6 miles south of Sioux City, Iowa. During 1956 and the first quarter of 1957, it made shipments of its products to scattered points in 30 of the States embraced in the instant application and received inbound shipments of raw materials from scattered points in 17 of the States involved. There is no indication as to the frequency of the shipments referred to, the volume moved to any particular point, whether the traffic moved by rail or motor vehicle, whether, if by truck, it moved in truckload or less-than-truckload quantities, or how much moved through the Omaha gateway. On or about March 15, 1957, a number of its employees went on strike and a picket line was established around its Dakota City plant. As a result, the carriers formerly serving its plant, except stockholder Abler Transfer, discontinued providing pickup and delivery service at the plant. It supports the instant application in order that it may route inbound and outbound shipments via Abler Transfer through Omaha, at which point the shipments would be interchanged with applicant.

Two firms at Ord, Nebr., support the application. One is a dealer in farm implements and has occasion to receive shipments of implements and parts from Hopkins, Minn., Chicago and Rock Island, Ill., and Kansas City. The other sells and constructs steel farm buildings and receives most of its materials from Detroit, Mich. Their inbound ship-

5. Omaha Parlor Frame Company and the Chardon Company are affiliated firms occupying the same premises at Omaha. No attempt was made to distinguish between the separate requirements of the affiliates and we shall consider them as a single firm.

ments move predominantly through Omaha and they specify Romans Motor Freight as the delivering carrier out of Omaha because Romans provides a daily service between Omaha and Ord. Their routing instructions are frequently ignored and they have experienced numerous delays in delivery as a result of the traffic having been turned over for ultimate delivery to rail carriers or motor carriers serving Ord only on an irregular nonscheduled basis. Shipments diverted to rail involve added expense to the consignees because they are required to pay the difference between the all-motor joint rates under which the shipments were dispatched and the combination local motor and rail rates through Omaha or other points. A majority of the consignments to these two firms are in less-than-truckload quantities.

Wheeler Lumber, Bridge & Supply Company supplies bridge construction materials and pole line materials to contractors. It has a warehouse at Norfolk and has occasion to ship or receive supplies from or to that point. The majority of its supplies, consisting of lumber and poles, originate on the west coast and move into Norfolk by rail. It does, however, receive some materials from such points as Minneapolis and Duluth, Minn., Chicago and Peoria, Ill., St. Louis, Kansas City, and Pittsburgh, Pa., and about 75 percent of such traffic moves by truck. It has received alternate service from Clark Bros., and Abler Transfer in respect of traffic moving through the Omaha gateway and regularly specifies delivery by such carriers from Omaha. Such routing instructions are not always followed, however, and it frequently has experienced unwarranted delays in the delivery of its materials at Norfolk. It admittedly has single-line service from Minneapolis to Norfolk through the Sioux City gateway, and no difficulty appears to have been encountered on traffic moving in that manner. The company also has occasion

to make outbound shipments from its Norfolk warehouse to points in Iowa, and to some extent to points in Kansas, Minnesota, South Dakota, and Wyoming. If the instant application is granted it might ship to points in such States through the Omaha gateway, although admittedly the routing through Omaha would be circuitous to points north and west of Norfolk. As to the inbound shipments, there is no indication as to the volume received from any particular point, the frequency of service which might be required, or the percentage of shipments which might move in truckload or less-than-truckload quantities. As to the outbound traffic, there is no indication as to the points at which it desires service, the volume of traffic which might be expected to move into such States, the frequency of service which might be required, the nature of the shipments as to whether truckload or less-than-truckload, or the routings heretofore utilized. Further, the shipper appears to have made little or no investigation as to the service available to it other than that in connection with Clark Bros., and Abler Transfer through the Omaha gateway.

The remaining shipper submitting evidence in support of the application is Ford Storage and Moving Company. This firm operates two general warehouses at Omaha, and one at Council Bluffs, and has occasion to receive shipments of merchandise from out-of-state points and to make distribution of merchandise to points in the surrounding States. A Teamsters' picket line was established at its Omaha warehouses on or about May 24, 1956, and was still in existence at the time of the hearing herein. As a result, practically all inbound motor deliveries were discontinued and all attempts to obtain outbound service from the warehouses by unionized motor carriers theretofore utilized have been unsuccessful. Suppliers have been requested to make all inbound shipments by rail and they appear to have been generally agreeable. The inability to

obtain outbound service from the unionized carriers is said to have resulted in the loss of certain substantial accounts, and it is feared that additional business losses will result from the company's inability to obtain motor service, both inbound and outbound, to the extent that such service was available prior to the time the picket lines were established.

The record is vague and confusing as to the exact nature and scope of the motor service which might be required. During 1956, prior to the establishment of the picket lines, the company received inbound motor shipments, in substantial quantity, from Chicago, St. Louis, Kansas City, Louisville, Ky., Durham and Winston-Salem, N. C., Cincinnati, Ohio, Beloit, Wis., and Sioux Falls, S. Dak., and in smaller quantity from Bloomington, Ill., Duluth and Minneapolis, Minn., Buffalo, N. Y., Toledo, Ohio, and Houston, Tex. All of this traffic, however, with the exception of that originating at the two Minnesota points, appears to have either originated or been interchanged at Chicago, St. Louis, or Kansas City. Only 23,000 pounds originated at Duluth, and only 4,000 pounds at Minneapolis, and there is no indication as to the routing. There is no information whatever concerning the nature and extent of the outbound motor shipments made during that period, or thereafter, except the mere statement that outbound traffic moves to points in Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado, and that some is transported by rail and some by motor vehicle.

Obviously, the evidence submitted on behalf of the supporting shippers falls far short of establishing any substantial need on the part of the shipping public for additional motor service to the extent proposed, or, in fact, to any extent exceeding that for which a need is shown in the title proceeding and duplicative thereof. We cannot con-

sistently grant authority for the institution of a new service without a clear indication that the service sought to be established is needed by the shipping public and will be utilized in the event the authority sought is granted. We cannot make the necessary findings concerning a need for additional service unless we are furnished precise information in connection therewith. The fact that the stockholder-carriers have experienced difficulty in effecting interchange arrangements at Omaha and the fact that a few Omaha shippers have experienced difficulty in obtaining pickup and delivery service at their places of business does not establish a need for additional single-line service between Omaha and all points in 32 States.

In addition to the paucity of evidence concerning the existence of any substantial need on the part of the public for the service proposed, there is no convincing evidence that applicant has the resources or the experience to conduct such an extensive operation. No plan is advanced and non is apparent for handling less-than-truckload traffic over such a wide area and a considerable portion of the traffic here involved falls within that category. Even in connection with the movement of truckload traffic there is serious doubt as to whether applicant would be able to obtain return loads with sufficient frequency to effect a feasible and profitable overall operation.

We conclude that applicant has failed to establish a need on the part of the public for any part of the service proposed in the Sub-2 proceeding with the possible exception of that between Omaha and such points as Chicago, St. Louis, and Kansas City, which service would duplicate that for which authority is sought in the title proceeding, and that the Sub-2 application should be denied. In the circumstances, there is no need to discuss the voluminous evidence submitted on behalf of the opposing rail and motor carrier operating in the affected territory.

*Further Discussion and Conclusions.* We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding-out to the public, and they are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot bargain away their duties and obligations to the public and thereby relieve themselves of such obligations.

The breakdown in interchange arrangements at Omaha between the unionized carriers and the stockholder-carriers and the refusal of the unionized carriers to provide pickup and delivery service at establishments where picket lines have been established has resulted in a substantial disruption in motor service to a large portion of the Nebraska shipping public, and the responsibility for the service deficiencies shown to exist must be laid at the doors of the unionized carriers which preempted their obligations to the Union to their obligations to the public. We do not hold

that all instances of refusal to provide service are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers. The apprehensions of certain of the organized carriers that any opposition to the demands of the Union would have resulted in reprisals against them appears greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros. Transportation Co., Inc. changed its policy against interchange with "unfair" carriers before the close of the hearings herein without experiencing any difficulty. The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by the mere acquiescence in the boycott, the unionized carriers lose the protection which section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby. See *Carpenters' Union* v. *Labor Board*, 357 U. S. 93.

In a situation such as that here presented, there arises a

question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely the filing of the instant applications under the provisions of section 207 of the act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen.

One other matter requires consideration. As seen, the stockholders of the applicant corporation are carriers in their own right and jointly control applicant through stock ownership. Section 5 of the act provides that it shall be lawful with the approval and authorization of the Commission for any carrier, or two or more carriers jointly, to acquire control of another carrier through ownership of its stock. No application for such approval and authorization has been filed in connection with the acquisition by the stockholder-carriers of control of applicant, and any grant of authority found warranted herein will be conditioned upon the filing of such an application and the obtaining of our approval for the control now exercised.

At this point it may be well to note that the situation here presented differs from that considered in *Galveston*

*Truck Line Corporation Extension—Oklahoma,* ..... M. C. C. ....., decided concurrently herewith, in that the labor difficulties upon which the cited proceeding was based had, with one minor exception, ceased to exist for some time prior to the hearing, whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term "present or future public convenience and necessity" in section 207 of the act, under which the applications were filed.

We find, in No. MC-116067, that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Nebr., and Chicago, Ill., (a) from Omaha over Alternate U. S. Highway 30 to junction U. S. Highway 30 at or near Missouri Valley, Iowa, thence over U. S. Highway 30 to junction Illinois Highway 65 at or near Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, thence over U. S. Highway 34 to Chicago, and return over the same route, and (b) from Omaha over U. S. Highway 6 to junction U. S. Highway 66 near Joliet, Ill., thence over U. S. Highway 66 to Chicago, and return over the same route, and (2) between Omaha and St. Louis, Mo., from Omaha over U. S. Highway 275 to junction U. S. Highway 34 at or near Glenwood, Iowa, thence over U. S. Highway 34 to Kansas City, Mo., thence over U. S. Highway 40 to St. Louis, and return over the same route, serving no intermediate points on routes (1)(a) and (1)(b), and serving the intermediate point of Kansas City on route (2), restricted, in each instance, to traffic originating at or

destined to points in Nebraska; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted, subject to the condition that the stockholder-carriers controlling applicant shall first obtain our approval of such control under the provisions of section 5 of the Interstate Commerce Act; and that in all other respects the application should be denied.

We further find, in No. MC-116067 (Sub-No. 2), that applicant has failed to establish that the proposed operation is required by the present or future public convenience and necessity, and that the application should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, and upon obtaining our approval of the acquisition by its stockholders of control of the corporation, an appropriate certificate will be issued. An order will be entered denying No. MC-116067 except to the extent granted herein, and denying No. MC-116067 (Sub-No. 2) in its entirety.

COMMISSIONERS MURPHY, WALRATH, GOFF, and WEBB did not participate.

No. MC-116067

## Appendix A (to Commission's Decision).

### Nebraska Short Line Carriers, Inc.

#### Description of Authority Sought.

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30, to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Missouri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66, thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph,

Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of June, A. D. 1959.

No. MC-116067.

Nebraska Short Line Carriers, Inc., Common Carrier Application.

No. MC-116067 (Sub-No. 2).

Nebraska Short Line Carriers, Inc., Extension—32 States.

Investigation of the matters and things involved in these proceedings having been made, and said Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application in No. MC-116067, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That said application in No. MC-116067 (Sub-No. 2), be, and it is hereby denied.

By the Commission.

Harold D. McCoy,
*Secretary.*

(Seal)

## APPENDIX C.

No. MC-116067.

Nebraska Short Line Carriers, Inc.

Common Carrier Application.

### REPORT AND ORDER.

RECOMMENDED BY DONALD R. SUTHERLAND, EXAMINER.

By application filed June 22, 1956, as amended, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, from and to the points, over the routes and in the manner set forth in appendix A hereto. Certain carriers[1] and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 554, hereafter called Teamster, oppose the application.

1. Bruce Motor Freight, Inc., Brady Motorfrate, Inc., Burlington Truck Lines, Inc., Churchill Truck Lines, Inc., Denver-Chicago Trucking Company, Inc., H. & W. Motor Express Company, Illinois-California Express Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Prucka Transportation, Inc., Red Ball Transfer Co., Ringsby Truck Lines, Inc., Rock Island Motor Transit Co., Santa Fe Trail Transportation Co., Union Transfer Company, doing business as Union Freightways, Watson Bros. Transportation Co., Inc., herein called Bruce, Brady, Burlington, Churchill, D. C. T., H. & W., I. C. X., Independent, Interstate Motor, Navajo, P. I. E., Prucka, Red Ball, Ringsby, Rock Island Motor, Santa Fe Trail, Freightways, and Watson, respectively. The application is opposed also by class 1 rail carriers in western trunkline territory.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on certain days in January and February, 1957, at Lincoln. Briefs have been filed.

Applicant, a corporation organized initially on June 14, 1956, is authorized to issue 1,000 shares of common and 5,000 shares of preferred stock at $100 per share.[2] At the time of hearing $37,550 of common stock had been issued. This was held in varying amounts by the following short-line nonunion motor carriers operating between certain points in Nebraska: John Jack Romans, doing business as Romans Motor Freight, Fred L. and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, partners, doing business as McKay Freight Line, Waldo W. and Hubert B. Winter, doing business as Winter Bros., Abler Transfer, Inc., Herbert Peters, doing business as Fremont Express Co., Henry G. Frear, doing business as (1) Superior Transfer, and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Louis Steffensmeir, and Edward Steffensmeir, doing business as Steffy's Transfer, Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, hereafter called, Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Frear, Derickson, Steffy, and Wilber, respectively, and Harvey Tillman of Tillman Transfer Company. Romans is President, C. C. McKay is Vice President, Walter F. Clark, Secretary, and Lyon is Treasurer. These same persons, along with Leonard Abler, are the directors. Some of the stockholders hold certificate from this Com-

2. When the organization was initially incorporated the shares of common stock had a par value of $50 each, and the preferred was $100 per share. Subsequently, after the incorporation papers were amended, the common stock was reissued in the amount of $100 per share to comply with Nebraska laws. Each $50 payment which had been made on stock constitutes a half share.

mission, and others have authority from the Nebraska State Railway Commission which they have registered with the Interstate Commerce Commission under the second proviso of section 206(a) of the act. As here material, most of them are authorized to transport general commodities, with exceptions, between certain points in eastern and central Nebraska, including Omaha and Lincoln. One carrier, Derickson, operates between Grand Island and North Platte. Collectively, they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration.

Applicant's traffic manager has investigated the availability of terminal facilities at certain points and has been assured that necessary space is obtainable at Chicago, St. Louis, Kansas City, Minneapolis, and Denver. No investigation was made with respect to Des Moines. He has also found upon investigation that drivers and plenty of motor vehicles can be leased for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease some equipment from its stockholders or other motor carriers. No definite schedules have been set up regarding the proposed operations, and the frequency of such schedules would depend to some extent on the availability of traffic. Although the traffic manager indicates that one driver would be used on each vehicle at the beginning of operations, relay points would be established if necessary. It is estimated that the running time from Omaha to Chicago would approximate 18 hours. If the authority sought is granted, applicant proposes to hold such service out to the public generally. Its general manager indicated that no discrimination would be shown in selecting carriers for interchanging traffic. As of January 26, 1957, applicant had total assets of $32,785; liabilities of $467, and net worth of $32,318.

By order of December 4, 1956, in No. MC-116067 (Sub-

No. 1) TA, the issuance of temporary authority to applicant was approved for 180 days upon compliance with certain requirements, which were met January 3, 1957. Joint petitions for reconsideration filed by Watson, Freightways, Red Ball, and Prucka, to the temporary authority order were denied by the Commission on February 25, 1957. The temporary authority is set forth in appendix B hereto. Temporary authority is granted under section 210a of the act, and such a grant creates no presumption that corresponding permanent authority will be granted thereafter. In No. MC-116067 (Sub-No. 2) applicant has applied for certain permanent irregular-route authority for the transportation of general commodities, with exceptions, between Omaha, on the one hand, and, on the other points in certain States. A hearing has been held on that application and the matter is still pending.

In or about May, 1956, the stockholders began to experience difficulty at Omaha, Lincoln, and Grand Island, Nebraska in respect of interstate traffic normally interchanged at those points with certain connecting motor carriers. For example, Romans was informed in Omaha by an official of Independent that the latter carrier was risking labor difficulties with its employees, who are members of Teamsters, if normal interchange of shipments between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956 were not accepted by that carrier. These shipments, which were not tendered to any railroad, were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it does not do so in every instance. Furthermore, Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grant Island, particularly with Red Ball and Watson. Time is

consumed in finding motor carriers willing to accept traffic, and Romans' operations are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made periodically to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Romans has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight in 1956 decreased somewhat compared to the 1955 volume. His gross revenue in 1956 was $159,280 and $138,775 in 1955. Prior to May 1956, 30 percent of his traffic consisted of outbound shipments from the area he serves, and 70 percent was inbound. Presently, most of his traffic consists of shipments moving out of the territory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prucka, Red Ball, Ringsby, Santa Fe Trail, and Watson; also with Burlington-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl's Express, Inc., Ideal Truck line, Iowa-Nebraska Transportation Co., Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company and Wright Motor Freight Lines, hereafter called B-C Cartage D. M. T.,

Haeckl, Ideal I. N. T., McMakin, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson, and Wright, respectively. These were most of the major motor carriers with whom interchange was effected. After the approximate date of May 7, 1956, they would not tender or accept freight from Romans at certain times, and this has continued. However, as previously shown, Burlington, Santa Fe Trail, and Rock Island have continued interchange with Romans, and Ringsby also has accepted freight. Romans has not been requested by his employees to obtain a union contract. He does not think any of them are members of a union. There have been no strikes by his employees, and no pickets have been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk and it serves Sioux City, Iowa, as well as Omaha. However, no terminal facilities have been operated by this carrier at Sioux City since about March 15, 1956, when certain unionized connecting motor lines serving that point discontinued normal interchange operations with Abler. Shortly thereafter, a similar discontinuance of normal interchange began at Omaha by most of the carriers with whom Abler interlined freight. Burlington and Santa Fe Trail continued to interchange traffic, and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and Sturm. In June 1955, at both Sioux City and Omaha, Abler interchanged 400 shipments with Watson, and in June 1956, none were interchanged. In June 1955, at the same two points it received from 300 to 500 shipments from Freightways, and in June 1956, it interchanged about five shipments with that carrier. In the first nine months of 1956, Abler's gross revenue, including interstate and intrastate traffic was about $70,000 less than that for the corresponding period of 1955. Abler was approached by union representatives, beginning in August 1955, relative to signing a contract.

He was advised by one union representative that a drive was on for memberships in Nebraska and the nonunion motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebr. It operates to and from about 45 points in Nebraska, some of which are not served by any other regular route motor carrier. Service is rendered daily out of Omaha and Lincoln. On or about April 17, 1956, a large number of motor carriers discontinued normal interchange with McKay at Omaha and Lincoln. At Omaha and Lincoln in 1955, McKay received 1,215 interstate shipments by interline from other motor carriers, and in 1956 it received only 210. Gross revenue in 1955 amounted to $205,000, and $156,000 in 1956. On some occasions McKay's driver was permitted to pick up the necessary freight bills and shipments at certain connecting carriers terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April 17, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with McKay.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals about $60,000 and approximately 40 percent of this amount is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa, and Crete, Nebr.

Tillman operates between Fremont and Lincoln. In 1956 this carrier grossed about $47,000. About 10 percent of this was derived from transporting interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball, and McKay.

Peters operates daily between Omaha and Fremont and transports some interstate traffic between these points.

At the time of hearing, Peters was still interchanging traffic with Prucka, Burlington, and I. N. T. He still interchanges freight now and then with certain other motor carriers, but not as frequently as formerly. Merchants, for example, before April 1956, gave Peters a substantial amount of traffic, but after that time very little. Also, certain traffic which Peters had received from Independent was given to Joe Roy Freight Line, hereafter called Roy. Most of Peters' present interchange traffic consists of shipments received in Omaha from National Carloading Company for delivery to Fremont. He grossed about $20,800 in 1956 which compares favorably with other years, and about 85 percent of this revenue was derived from interstate business.

Derickson operates daily over U. S. Highway 30 between Grand Island and North Platte and interlines traffic at those points with various motor carriers without any apparent difficulties. Derickson serves numerous consignees who route their traffic for ultimate delivery over his line. Derickson has a number of competitors between Grand Island and North Platte, and considers the service he renders between these points as adequate.

Steffy operates over routes between Omaha and Creston, Nebr., and between Dodge, Nebr., and Sioux City. Some of Steffy's authorized points on and near Nebraska Highway 91, east of Creston, are not known to be served by any other motor carrier on a regular basis. It interchanges interstate traffic with various motor carriers at Omaha. Its profit in 1955 amounted to about $6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh, and Central City. He serves about 30 Nebraska points regularly, and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha

and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters (Local No. 554) to sign a contract. Lyon inquired whether the union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the union to induce Lyon to sign a contract and when these attempts failed normal interchange ceased at Omaha on or about March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain operators continued to interline shipments with him on a regular basis, viz., Bos Truck Lines, Inc., hereafter called Bos, Burlington, Ringsby, D. M. T., and National Carloading. Also, at the time of hearing he was interchanging with Merchants on Minneapolis St. Paul traffic. D. M. T., and Prucka tendered some freight to Lyon during the last week of January, 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments: however, there have been instances when Lyon has not been given freight by these carriers which was routed over his line. The authority sought by applicant between Central City and Omaha duplicates Lyon's and Romans' operating rights between these points, and Lyon does not believe there is any need for additional service on that portion of the route between Omaha and Central City. There have been no strikes or labor disputes on Lyon's line, and no pickets at his places of business.

Winter operates between Omaha and Lincoln. The amount of interstate traffic transported by this carrier between these points is small. Winter's representative

believes more interstate traffic would be obtained if the application herein is granted.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in southeastern Nebraska, including operations from Pawnee City to Lincoln; Lincoln to Beatrice; and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points in southeastern Nebraska, including operations between Superior and Hastings; Superior and Franklin, and Fairbury and Franklin. The Pawnee Transfer and Superior Transfer operations are not connected by any regular route. The operations, however, can be connected by the use of certain described irregular route authority.

Clark operates over regular routes between Omaha, Lincoln, and south Sioux City, on the one hand, and, on the other, numerous points in northeastern Nebraska, including Fremont, Norfolk, Neligh, Grand Island, Newman Grove, and Madison. It serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its interstate traffic at Omaha, and some at Lincoln. About 90 percent of its traffic is transported between Omaha at Norfolk. In 1955 Clark grossed $286,346, 40 percent from interstate and 60 percent from intrastate traffic. In 1956 gross revenue was $217,412, 4 percent from interstate and 96 from intrastate. Prior to September 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955 representatives of Teamsters (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a contract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955 a picket line was placed at Clark's Omaha terminal. Thereafter, deliveries of interchange traffic to

Clark's terminal at Omaha ceased generally. Clark did, where possible, deliver outbound interchange shipments to connecting carriers. On or about October 1, 1955 Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board, hereafter called NLRB. This action culminated in a signing of a settlement agreement on December 7, 1955 by representatives of Local No. 554, Fred L. Clark, and a representative of NLRB. The agreement was approved December 8, 1955 by the Regional Director of NLRB. Among other things, the agreement provided for the posting of a notice at the business office of Local No. 554 in Omaha. The notice in effect stated that the union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D. M. T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials, or commodities or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the union as the collective bargaining representatives of its employees, unless and until the union had been certified as such bargaining representative in accordance with the provisions of section 9 of the NLRB Act. This notice was also posted at various docks and terminals in Omaha. Thereafter, normal interchange with most motor carriers was resumed for awhile until Clark's interline business dropped noticeably after January 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington, and Wilson. Pickets, however, remained at Clark's terminal and were still there in March 1956. One of Clark's former employees

(employed prior to September 14, 1955) is a picket. No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On September 14, 1955, he had seven employees.

Clark sought further relief and the NLRB obtained a temporary injunction on behalf of Clark against the union signed by the Chief Judge of the United States District Court for the District of Nebraska on July 30, 1956. The order of the Court, pending final adjudication by the NLRB of the matter involving Clark and the union[3], was calculated to enjoin picketing at the premises of motor carriers[4] and shippers who did business with Clark and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where the object was to force or require said carriers or employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the Teamsters (Local No. 554) or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters or such other labor organization was certified as the representative of said employees in accordance with section 9 of the NLRB act. Thereafter, Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances are shown where D. M. T., Haeckl, Red Ball, Burlington, and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of inter-

3. Hearing on this matter was held before an NLRB examiner in May 1956.

4. Carters' premises specifically named in the order were those of Santa Fe Trail, D. M. T., I. N. T., Merchants, Bos, Independent, Wilson, Trans-American, and Red Ball.

state freight have been made to certain carriers and Clark found that the traffic was accepted in some instances and refused at other times. Santa Fe Trail, with one exception, has accepted freight from Clark. In nearly every instance Clark has been able to find a motor carrier willing to accept the interstate shipments. No instances are cited where rail carriers ever refused any shipments tendered by Clark. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments.

In regard to the NLRB proceeding involving Clark and the union, on December 26, 1956, an order was entered by NLRB requiring Teamsters (Local No. 554) to cease and desist from certain unfair labor practices in violation of section 8(b) (4)(A) and (B) of the National Labor Relations Act, and directing the union to take certain affirmative action, including the posting of a described notice. A copy of the NLRB order and a copy of the notice attached to that order are set forth in appendix C hereto. The NLRB order refers to certain employers at which premises notices should be posted by Teamsters Local 554. In addition to Clark, the employers identified in the NLRB record as affected by the Union's unfair labor practices are: C. A. Swanson & Sons; Omaha Cold Storage Company; Wilson Packing Co.; Swift & Co.; Santa Fe Trail; D. M. T.; Beacons Van & Storage Co.; Independent; I. N. T.; William A. Volker & Company; Bos; Sinclair Refining Company; Wilson Truck Lines; Red Ball; Haeckl; Merchants; and Darling Transfer Co.

Generally, the stockholders of applicant, with the exception of Clark, have had no dispute of strike with their employees. They are parties to certain tariffs published by certain rate bureaus and have executed concurrences for the interchange of freight on through routes and

through rates with various connecting motor carriers, including protesting motor carriers herein who also are parties to the tariffs published by the described rate bureaus. They hold themselves out to transport interstate freight on a through route-through rate basis. As to Clark, it has received only one cancellation notice on concurrences, from Riss and Company. If the authority sought herein is granted, the stockholders intend generally to enter into tariff concurrences with applicant and interline traffic thereunder.

SHIPPER EVIDENCE.

The shippers and consignees in support of the application are located at Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. Generally, with some exceptions, the traffic of these shippers and consignees involve less-than-truckload shipments.

*Arcadia*—The witness from this point operates the only drug store which serves an area of about 10 miles. No motor carrier serves Arcadia regularly other than Romans and that carrier is selected by the consignee to deliver his shipments which originate in or near St. Louis. Certain regular stock orders are received about twice a year, and additional shipments approximately every six weeks. Rail service is available to Arcadia, but freight trains do not arrive daily. Prior to the spring of 1956, motor carrier service was used more extensively than rail for the delivery of shipments and such service was satisfactory. After that time certain of consignees shipments which had been routed by motor carrier all the way from origin to Arcadia began to arrive by rail. In some instances Watson transported shipments to Grand Island and delivered them to the railroad for movement to Arcadia.

Some of the commodities involved were drugs which required expeditious delivery and the described combination motor-rail service was too slow. These shipments were routed by Watson and "Loup Valley", a carrier which had discontinued serving Arcadia. Since the shipments were routed by motor carrier the consignee expected that they would be delivered in this manner, and no authority was given to divert the shipments to rail. Some of the drugs require protection against freezing and because they are perishable motor carrier service is designated. Delivery of the described shipments by rail instead of motor vehicle resulted in drayage expenses and inconvenience to the consignee. Consignee has not given any consideration to using an originating carrier other than Watson from St. Louis, but has no objection to using Burlington to transport his shipments from that point. If the authority sought is granted, consignee would route shipments by applicant to Omaha or Grand Island and thence by Romans to Arcadia.

*Burwell*—Certain retail establishments at this point receive small shipments from Chicago, Des Moines, Kansas City, St. Louis, Minneapolis, and Denver, and pay the freight charges thereon. Prior to April, 1956, an automobile dealer received regular stock orders and rush shipments from Des Moines by motor carrier; also certain rush orders from Kansas City. On such traffic he specified Romans as the delivering carrier but did not designate the origin carriers. D. M. T. originated shipments in Des Moines, and the 2-day service rendered from that point was satisfactory. Red Ball originated the Kansas City shipments. After April 1, 1956, his shipments began arriving in Burwell by rail although he continued routing by Romans. In one instance the consignee was out of certain parts ordered from Kansas City. These were transported to Omaha by Red Ball and forwarded to

Burwell by rail. This type of service was too slow and inconvenient. In the three months prior to February 1957, however, the Kansas City shipments were again being delivered by Romans. D. M. T. also forwarded a Des Moines shipment from Omaha by rail to Burwell, which service was unsatisfactory and slower than the all-motor carrier service. In addition to the normal freight charges which consignee pays, certain other expenses were incurred on the combination motor-rail service. Consignee complained to its supplier in Des Moines and after July 9, 1956, some shipments were transported by D. M. T., and delivered by Romans. However, certain shipments routed by motor carrier from Des Moines were still delivered by rail. Since April, 1956, consignee has had difficulty in preparing its stock orders properly because of irregular delivery service. Sometimes when the placement of a current order is due, consignee has not yet received the previous order. In January, 1957, a shipment of parts from DesMoines was delivered by Romans. On Des Moines shipments, consignee has not requested its supplier to use a different origin carrier, although he has no objection to the use thereof.

A Burwell clothing merchant and a drug store owner have had experience similar to those of the automobile dealer. Shipments to them from Denver, St. Louis, and Kansas City routed by motor carrier have been diverted to rail. A shipment from Denver and two from St. Louis in the fall of 1956 destined to the clothing merchant were diverted by Watson to rail at Grand Island. In fact, from May through October, 1956, numerous shipments were received from St. Louis and Denver with some delivered by rail as described and some by Service Oil Company, hereafter called Service Oil, a competitor of Romans. Prior to the spring of 1956 this consignee had arranged to route most of his merchandise "by truck" and Romans,

who serves Burwell regularly, usually delivered the shipments. Consignee operates on a small inventory and prompt service is important. In or about October 1956, he requested suppliers to ship certain sized shipments by rail all the way because the combination rail motor service resulted in extra charges. Since then most of his shipments have been transported all rail and this is slower than the previous all-truck service. In January 1957, a shipment originating in St. Louis was delivered by Romans, and consignee desires the continuation of deliveries by that carrier. The drug store in Burwell, which pays the freight on some shipments, serves a substantial area, and it requires daily service by motor vehicle because its business is conducted on a low inventory. Rail service to Burwell is provided three days per week. Prior to the early summer of 1956, all its shipments from Chicago, St. Louis, Kansas City and Denver moved by truck and were delivered by Romans, which service was satisfactory. Thereafter, it began to receive shipments by rail. For example, a shipment in August was transported by Red Ball from Kansas City to Omaha and diverted to rail for delivery. This combined motor-rail service was slow and inconvenient. This consignee is willing to use a motor carrier for service from Denver to Grand Island for interchange with Romans at that point instead of Omaha.

A butter factory at Burwell ships truckloads of butter to Chicago. Each truckload, which moves about twice monthly, weighs 30,000 pounds, and is valued at $18,000. Since the butter is perishable the shipper requires a dependable motor carrier service from origin to destination. Rail service is available from Burwell only on a tri-weekly basis, and shipper's factory is not located on a rail siding. The shipper does not route the traffic beyond Omaha, leaving it up to Romans to select a connecting carrier. Prior to March or April 1956, this arrangement was satisfactory

and the butter usually was delivered in Chicago on the second day. In some instances the trailers of Independent were loaded in Burwell by Romans and the shipment moved to Chicago without transfer of lading. Watson was also used as a connecting carrier. After April 1956, on two occasions, the consignee in Chicago phoned the shipper to inquire about shipments that had not yet been received. Because of this and the prevailing situation there is some anxiety on the shipper's part concerning the delivery of its shipments. However, all butter shipments tendered to Romans have moved to destination, and generally deliveries have been made on the second morning. The owners of the butter factory also operate an oil company in Burwell, retailing gasoline, oil, tires, auto accessories, and certain related commodities. The oil company had not received any inbound shipments from Chicago since the spring of 1956 and its representative was not certain whether any had originated at Minneapolis since that time. Some tanks had been received from St. Louis in May or June 1956, but it was not known definitely how this traffic was shipped.

*Ord*—Since July 1, 1956 a leather goods store had received about 57 shipments and approximately 37 originated at Chicago, Minneapolis, St. Louis, Kansas City, Denver, St. Joseph, and Des Moines. Its business is operated on a small inventory and prompt delivery is required on most shipments. Since about 1952 Romans has been designated by consignee to deliver most of the traffic although occasional shipments move by rail. Rail, however, is not satisfactory because daily service is not available at Ord. During the last six months of 1956 certain shipments from St. Joseph, Denver, Kansas City, Minneapolis, St. Louis, and Denver were delivered by motor carriers other than Romans. For example, a shipment from Minneapolis in November on which the consignee had requested shipper's

salesman to route by Romans for delivery was transported to Grand Island by Watson and transferred to Portis Transfer, hereafter called Portis. Service Oil has also delivered some shipments. Certain shipments from St. Joseph and Denver were routed rail from those points by the suppliers. The service of the other delivering motor carriers is not as satisfactory as that of Romans because the latter conducts a daily service at Ord. This store has no objection to using Burlington as an origin carrier from the points that carrier serves, and consignee recognizes that its suppliers might not have specified Romans as the delivering motor carrier in all instances.

A clothing store at Ord receives shipments from Chicago, St. Louis, Kansas City, St. Joseph, Denver, and Des Moines. It pays the freight charges, and motor carrier service is used more than rail for the necessary transportation. For a long time Romans has been designated as the delivering carrier on shipments from St. Joseph and Kansas City, and Romans has also delivered some Chicago shipments. Railway Express Agency, Inc., is used on shipments from Denver and St. Louis. Motor carrier shipments are received from Des Moines about twice a year. In or about June 1956, consignee began receiving deliveries by motor carriers other than Romans. Portis, in particular, has been delivering most of the shipments. Also, a shipment originating at Chicago in September 1956, was transported by combination motor rail. Prucka transported this shipment from Chicago to Omaha and transferred it to rail for delivery to Ord. This type of service was slow compared to the all-motor service rendered in connection with Romans. Also, the service by Portis is unsatisfactory because deliveries are usually made in the afternoon whereas Romans makes morning deliveries. Portis was requested to make morning deliveries but could not do so under its operating schedules. The availability

of daily delivery service by motor carrier is important in the proper functioning of consignees business.

A firm at Ord prints and publishes newspapers, magazines, catalogs, advertising material, and engages in certain other related activities. It ships a considerable amount of material to Chicago and some to Kansas City and Denver. It also buys certain supplies machinery, and repair parts in Chicago, and certain supplies and repair parts in Kansas City. Motor vehicle service is used for certain shipments to Chicago regularly and some traffic moves to Denver in this manner. Shipments to Kansas City, Minneapolis and St. Louis usually do not move by truck. Prior to the summer of 1956 this shipper used Romans in conjunction with Independent for service to Chicago and such service was satisfactory because customers could usually be assured of delivery within four days. Since that time certain of the Chicago customers have complained about delays in getting some shipments, and witness indicates some shipments take seven days for delivery. Some of the material shipped, such as monthly magazines, is dated and prompt delivery at destination is required. Also, catalogs for certain seasons of the year require expeditious and dependable handling. Presently, shipper can not assure its customers definitely of deliveries within a specified time and shipper's representative believes it has lost some business due to this situation. Shipper permits Romans to select the connecting carrier used beyond Omaha and witness could not name any carrier other than Independent which had been used beyond that point. This shipper also designated Romans to deliver inbound shipments from Chicago, and sometimes it specified the origin carrier. The inbound service prior to the summer of 1956 was satisfactory, but after that time the transportation on some shipments was slow. Burlington has not been specified to originate any Chicago shipments. Prior to the spring of 1956 some ship-

ments from Kansas City were transported by Burlington to Omaha for delivery by Romans and this service was satisfactory. After that time, however, one shipment was received by rail but witness did not know whether or not it had been routed in this manner all the way from Kansas City.

*Newman Grove*—A farm implement and machinery company receives shipments of repair parts from Kansas City, Kans. Regular stock orders are received about once a month and supplementary orders about once a week. Prior to the summer of 1956 these shipments were transported by Red Ball and Darling to Omaha and transferred to Lyon for delivery. Since that time carriers other than Lyon have been making deliveries. In some instances shipments were delivered by one of these other carriers to Neligh and the consignee had to pick them up at that point. Also, Roy has delivered some of the shipments to Newman Grove. Generally, the service of these carriers was not satisfactory because there had been some delays in receiving shipments and extra expense incurred by consignee. When Lyon delivered the shipments, service into Newman Grove was rendered four or five times a week. Roy does not render such frequent service. Frequent service, however, is required because some parts moving from Kansas City are needed by farmers to repair their harvesting machinery. Although rail service is available at Newman Grove, it is not rendered on a daily basis. Consignee has no objection to using Burlington or Santa Fe Trail as origin carriers if satisfactory service can be rendered.

A creamery in Newman Grove ships truckloads of butter regularly to Chicago. It selects Lyon to transport the shipments to Omaha, but does not designate the carrier beyond, although it has the privilege to do so. Usually, Lyon has interchanged the shipments at Omaha with I. N. T. Although on two occasions (in the summer) complaints

have been made on the condition of the butter when received at destination, most of shipments have been transported to Chicago satisfactorily. The creamery has not endeavored to obtain single-line motor carrier service from Newman Grove to Chicago or to route its shipments beyond Omaha over Burlington's line. Rail service is not used because it is not available daily at Newman Grove. In addition to outbound traffic, the creamery receives occasional shipments of supplies from Kansas City, Minneapolis and Chicago which are shipped by motor vehicle. The creamery des not designate the origin carrier on such shipments. It does, however, specify Lyon for delivery. In 1956 deliveries were made by other carriers. This was not satisfactory because of delays. In four months prior to February 14, 1957 most of the inbound shipments were delivered by Lyon. Abler and Clark delivered some shipments, and such service was satisfactory. The creamery is willing to use Burlington in connection with Abler and Clark if the traffic would move without delay. Rail is used for some inbound shipments but is not satisfactory for all, principally because such service at Newman Grove is provided less frequent than required.

*Sargent*—A department store at this point receives shipments from Kansas City, St. Louis, Minneapolis, Chicago, St. Joseph, and Des Moines. Prior to the summer of 1956, its traffic from these points was received by rail, motor carrier, and parcel post. Motor carrier shipments, with a few exceptions, were delivered by Romans, and such service was satisfactory. Consignee paid the freight charges on most shipments. Generally, consignee did not designate the origin carriers on the motor carrier shipments delivered by Romans. After the summer of 1956, motor carrier shipments began to arrive by rail and the receipt of merchandise was delayed; also, some extra expenses were incurred by the consignee. For example, a

shipment in August 1956 was transported by Prucka to Omaha and transferred to rail for delivery to Sargent. In early September, Merchants did the same thing on a shipment from St. Paul. Consignee then advised his suppliers to use all-rail service and since September 1956 deliveries of interstate shipments from the above-described origins have been made in this manner. Rail is a little slower than the all-motor service. Consignee is aware of no motor carrier other than Romans who serves Sargent regularly. One of Romans' drivers suggested that consignee route its traffic via Grand Island instead of Omaha but this advice was not followed.

A retail hardware store at Sargent receives shipments from Kansas City and St. Joseph. Prior to the summer of 1956, it used motor carrier service for transportation. Some of its customers, particularly contractors, desire expeditious deliveries of merchandise and motor carrier service is needed to satisfy their demands. Romans and another motor carrier (which sold its business) delivered most of the shipments and such service was satisfactory. Consignee began receiving its shipments by rail and in September 1956 it changed to that mode of transportation. Thereafter, it changed back to motor service. It designates Romans to suppliers' salesmen for deliveries but does not specify the origin carriers. In January 1957, consignee began receiving satisfactory service again with Romans as the delivering carrier.

A dealer in farm machinery, implements, and supplies, receives motor carrier shipments from a point near Minneapolis. The prior service with Romans as the delivering carrier was satisfactory, but in September 1956, consignee requested its supplier to use rail the entire distance. This resulted from the fact that D. M. T. had transported a shipment to Omaha and transferred it to rail for delivery to Sargent. Rail deliveries are not satisfactory because

daily service is not available at Sargent. Daily service by motor carrier is required for some shipments, particularly on parts which are needed by farmers for repair work. Consignee is not aware of any motor carrier other than Romans who serves Sargent regularly. When prior motor carrier service was used consignee attempted to designate the origin carrier in certain instances but the supplier did not follow such designations.

*Pierce*—A hardware merchant at this point receives merchandise from Minneapolis and most of the shipments are transported by truck. He operates on a low inventory and prompt deliveries by motor vehicle are required. Although he designates the delivering carrier, suppliers select the origin carrier. Prior to March 1956, Hess Motor Express, Inc., (now Murphy Motor Freight Lines), hereafter called Hess, transported the shipments from Minneapolis to Sioux City, and Abler delivered them to Pierce. This service was satisfactory. In March 1956, Hess refused to transfer certain Minneapolis shipments of consignee to Abler because the latter was a nonunion carrier. Consignee needed the merchandise involved, and traveled to Sioux City personally to pick up the shipments. After this experience he tried using rail service which was not satisfactory. He changed back to motor service and Middlewest Motor Freight (now Barber Transportation Company), hereafter called Middlewest, began delivering shipments. This service from Minneapolis is not as fast as that rendered when Abler made deliveries prior to March 1956. If applicant is granted authority from Minneapolis, consignee believes it can obtain satisfactory service by way of Omaha even though this is a more circuitous route than shipment via Sioux City.

*Tilden*—A retailer of petroleum products, tires, and accessories receives shipments from Des Moines and Kansas City by motor vehicle. He designates Clark to handle

deliveries and the suppliers select the origin carriers. Prior to the spring of 1956, the motor carrier service with Clark making deliveries was satisfactory. Since that time deliveries have been made by Middlewest, Abler, and Lyon. Shipments handled by Middlewest moved through Sioux City to Neligh, and are then delivered from that point to Tilden. Usually, about one week is required to deliver shipments from Kansas City and Des Moines. Consignee receives better service than this when the shipments are handled by Abler because Omaha is used as an interchange point instead of Sioux City.

*Loup City*—A dealer in farm equipment and small trucks receive shipments of truck parts from Kansas City. Prior to the summer of 1956, Romans and his predecessor, Loup Valley, delivered this traffic. Consignee paid the freight charges on some shipments and others were prepaid. Consignee had been routing this traffic via Darling from Kansas City to Omaha and thence by Romans to Loup City. In or about June 1956, deliveries were made by Arrow Freight Line, hereafter called Arrow. This was satisfactory, except Arrow delivered shipments in the afternoon whereas Romans made morning deliveries. Arrow, however, discontinued serving Loup City directly and transferred the shipments to Romans or Service Oil at Grand Island, which resulted in three-line service and consignee received its merchandise a day or two later.

*Neligh*—An automotive dealer at this point receives emergency shipments of parts from Des Moines. Normally, these shipments were transported by D. M. T. to Omaha and thence to Abler or Clark, which were designated by consignee, for delivery. Usually, three-day service was rendered by the described carriers and such service was satisfactory. In the spring of 1956, Middlewest and Lyon began to deliver shipments and delays in receiving parts occurred. Instead of three-day service from

Des Moines consignee in some instances received five-day service. Lyon's service usually has been quicker than that of Middlewest. Although the supplier at Des Moines, on many shipments, attempts to honor consignees' designations of delivering carriers, it does not do so in all instances. On some occasions, at consignee's request, Burlington has been used from Des Moines. The supplier, however, usually selects the origin carrier, and D. M. T. is used more frequently than Burlington. In some instances, when Burlington originated shipments, the service has been satisfactory, and at other times it has not. It is indicated, however, that shipments moving via Burlington and Abler have been transported satisfactorily. Recently, when Burlington was used from Des Moines, Abler rendered the delivery service.

*Norfolk*—A tire dealer, who operates on a small inventory, receives shipments principally from Kansas City, Chicago and St. Louis. Clark and Abler, which were designated by consignee, delivered the shipments and this service was satisfactory. In the fall of 1955, consignee began receiving shipments by other carriers. For example, a shipment from Kansas City was transported by Red Ball to Omaha and transferred to Roy instead of Clark. Consignee refused delivery by Roy, and the shipment was returned to Omaha. The merchandise finally was reshipped from Omaha and delivered by Clark. A shipment from St. Louis routed over Watsons' line for transfer to Clark was delivered by Roy. The service rendered by Roy is comparable to that rendered by Clark and Abler from Omaha to Norfolk. Recently, Burlington has been used for some shipments from Chicago and Kansas City, and these were transferred to Clark as requested. Such service was satisfactory. On other shipments from those points consignee's routing instructions were not honored by the suppliers who used other origin

carriers. Freightways has transported some shipments from Chicago and transferred them to Middlewest. Since October 1956, consignee's shipments, with some exceptions, have been delivered by Clark and at the time of hearing service was reasonably satisfactory.

A seed dealer at Norfolk receives shipments principally from Kansas City, Des Moines, and Chicago, and occasional shipments from Minneapolis and St. Louis. It operates on a small scale and requires expeditious transportation in some instances to replenish its stocks. It does not use rail service. It pays the freight on some shipments and the suppliers on others. In the summer of 1955 most of the shipments from Kansas City were transported by Watson, Prucka, Red Ball and Burlington, and transferred to Abler or Clark at Omaha for delivery. This service was satisfactory. In or about July 1956, consignee began receiving deliveries by other motor carriers, including Roy. In September 1956, it requested the Kansas City supplier to use Burlington and since then shipments from that point have been received satisfactorily. It has not designated specific origin carriers from Des Moines or Chicago. Usually, Watson originates the shipments from Chicago, Minneapolis, and St. Louis, and Burlington from Des Moines.

A dealer in outboard motors, boats, marine hardware and related articles receives shipments from Kansas City, and St. Joseph, on which he pays the freight. He does not maintain a larger stock of boats or motors, and frequently customers' purchases are ordered directly from the supplier. Therefore, expeditious transportation is required. Prior to April 1956, Darling transported the shipments from St. Joseph and Kansas City to Omaha and Abler delivered them. Consignee designated such service and it was particularly satisfactory because Abler notified the consignee prior to actual delivery of certain boats and

other bulky merchandise. This permitted consignee to arrange deliveries directly to his customers. In some instances Clark was used and provided a similar service. In or about April 1956, deliveries were made by other motor carriers, including Roy, even though Abler was still designated by consignee to handle the shipments. In January 1957, however, consignee routed a shipment from St. Joseph by Burlington and this was delivered by Abler. Apparently this service was satisfactory.

A retailer of plumbing fixtures, water softeners, and related supplies receives shipments from Chicago on which it designates the routing. Prior to September 1955, it used either Independent or Freightways from Chicago to Omaha and thence Abler or Clark to Norfolk. Since then the shipments have been delivered by other carriers, including Roy and Middlewest. In or about December 1956, consignee began routing its shipments from Chicago via Burlington; when Abler was specified as the delivering carrier, the routing was followed, but when Clark was designated the shipments usually were delivered by Roy. Consignee has no objection to using Ringsby from Chicago to Omaha if its service is as good as that of Burlington.

A dealer in heating and air conditioning equipment receives most of its shipments from Marshalltown, Iowa, and occasional freight from Des Moines, Chicago, Kansas City, and St. Louis. It pays the freight on this traffic, and routes the shipments from Marshalltown. The suppliers at Chicago, Kansas City, and St. Louis select the carriers used from those points and the dealer designates the delivering carrier. The dealer installs equipment in buildings at Norfolk and points nearby. Frequently, shipments from the described origins are made direct to the job sites. Prior to the fall of 1955, Bos was used from Marshalltown to Omaha and Clark delivered the shipments. This service was satisfactory, particularly since Clark made deliveries

direct to job site and operations of the dealer and its installation crews could be conducted efficiently. Although in 1956 Clark was still designated by the dealer on routings, certain shipments were delivered by other motor carriers, including Roy. Since the dealer was not certain his shipments would be delivered by Clark, some equipment which normally would have been routed directly to nearby job sites was routed to Norfolk. Clark is located at Norfolk, and the dealer finds it convenient to obtain information from that carrier concerning its shipments. He tried rail service on a shipment from Marshalltown but this was too slow to meet his needs. The dealer has no objection to using Santa Fe trail for shipments from Kansas City. It has complained to Bos about disregarding routings, but still receives shipments by carriers other than Clark.

A processor of dairy products at Norfolk receives shipments principally from Chicago, and some traffic from Denver, Kansas City, St. Louis, Des Moines, and Minneapolis. It pays the freight charges on a large percentage of the shipments from Chicago. Although it designates Clark and Abler for delivery of shipments, the suppliers usually select the origin carriers. Watson and Burlington, among others, have been used from Chicago. When Abler and Clark were used for deliveries, the service was satisfactory. In the latter part of 1955 deliveries were made by motor carriers other than those designated, including Roy and Middlewest. Delays occurred, and consignee complained to Watson. However, shipments from Chicago originated by Watson continued to be delivered by Roy.

The Young Men's Christian Association at Norfolk receives shipments of various supplies from Chicago, Kansas City, and St. Louis, and pays the freight charges thereon. Prior to September 1955, Clark was designated as the delivering carrier, and service by motor vehicle from the

above-named points was satisfactory. After that time consignee's designations of Clark were disregarded on numerous shipments and deliveries were made by other carriers, including Roy. Consignee has requested suppliers in Chicago to use Burlington, and those at Kansas City to ship by Santa Fe Trail. Shipments from those points are still delivered by Roy contrary to routings. In one instance, although Santa Fe Trail in conjunction with Roy rendered second day service on a shipment from Kansas City to Norfolk, consignee refused to accept it. It was ultimately delivered by Clark. The Norfolk Chamber of Commerce also supports the application.

*Columbus*—A company at this point is engaged in manufacturing farm and industrial equipment, including corn cribs, grain bins, crop-drying machines, and power steering devices. It receives various raw materials in considerable quantities from numerous points, including Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Ill., and Hammond, Ind. The majority of the inbound shipments are carloads transported by rail, and motor carrier service is used also. Outbound shipments are made to various points. During the last ten months of 1956 it made slightly over 1,200 shipments from Columbus, and 57 of these were destined to points on the routes involved herein. Prior to the summer of 1956 Lyon was used satisfactory as the originating carrier on some outbound shipments and delivered certain inbound traffic. Since then certain shipments routed from Columbus over Lyon's line have not been accepted by connecting carriers. In addition to Lyon a number of other motor carriers served Columbus directly, including Watson, Ringsby, Bos, Freightways. Also, this manufacturer operates some of its own motor vehicles. Generally these are used to points such as Chicago, where inbound shipments can be picked up for return to Columbus. Watson and Freightways have been

used for some shipments from Chicago to Columbus and such service was satisfactory.

*Fairbury*—A chain organization engaged in operating variety and department stores receives a wide range of commodities from Minneapolis, St. Paul, Chicago, Kansas City, and St. Louis. A considerable amount of the shipments from these points is transported by motor carriers. Consignee pays the freight charges on about 75 percent of these inbound shipments, and instructs its suppliers to use McKay as the delivering carrier. Various motor carriers have been used from the origins, including Burlington, Watson, and D. M. T. The motor carrier service prior to April 1956, was satisfactory. After that time consignee's designations of McKay were not honored, and it began to receive deliveries by Superior. That service, however, was not maintained with sufficient regularity to satisfy the consignee. Because its motor carrier routings were not honored completely, consignee began using rail service more extensively. Such service, however, is slower than the prior motor carrier service rendered in conjunction with McKay. Although Superior was still delivering some shipments in or about the latter part of 1956, McKay was not delivering any at that time to consignee.

A wholesale and retail store engaged in selling paint, wallpaper, floor coverings, and other merchandise receives shipments by motor carrier from St. Louis, Chicago, Lyons and Joliet, Ill., Kansas City, Minneapolis-St. Paul, and Des Moines. Prior to April 1956, most of the motor carrier shipments from the described origin points were transported by Watson to Lincoln and thence McKay to Fairbury. This service was satisfactory. Then other carriers, including Superior, began making deliveries contrary to designated routings. Consignee is not satisfied with Superior's service entirely because there have been some delays. Shipments from Chicago, in which consignee is

particularly interested, were not received as expeditiously as formerly. Consignee attempted to route Chicago shipments via Burlington but the supplier used other originating carriers, including Watson and Independent. In May 1956, consignee began using rail transportation more extensively from Chicago, which is slower than the service previously rendered by Watson and McKay.

A company at Fairbury manufactures pump jacks, cylinders, water supply equipment, and windmills. It is also a wholesaler of plumbing supplies. It receives shipments from Chicago, Kansas City, St. Louis, Des Moines, and Denver. Finished products are shipped from Fairbury to various points. The majority are routed by the consignees, and some by the manufacturer. It has used the joint service of McKay-Watson on shipments moving to certain undisclosed destinations in Iowa and Illinois. Prior to April 1956, a majority of the inbound shipments were delivered by McKay, whom the manufacturer designated on most orders. This service in conjunction with the origin carriers was satisfactory. In April 1956, Superior began delivering shipments, but such service was not entirely satisfactory because delays occurred in receiving merchandise. The manufacturer's purchasing agent was then instructed to use rail as much as possible for shipments from Chicago. However, this shipper still routes many shipments by McKay, who makes some deliveries, and such service has been satisfactory. The manufacturer is still not entirely satisfied with Superior's service. It has no objection to using Burlington or Ringsby as origin carriers from Chicago. On outbound shipments the manufacturer honors consignees' routings, and McKay is designated in some instances to originate shipments.

*Lincoln*—A wholesale drug company receives shipments from various points. Most of its traffic originates in Chicago, St. Louis, and Kansas City. Since its warehouse

space is limited, it buys in small quantities. Because of this method of operation expeditious deliveries by motor carrier are required. Various motor carriers are used to originate shipments from Chicago, including Independent, Red Ball, Haeckl, Freightways, Watson, and Prucka; Burlington. Watson, and Freightways are used extensively from St. Louis; and Red Ball, Watson, Prucka and Freightways from Kansas City. No complaint is made regarding the service from St. Louis and Kansas City, but dissatisfaction is expressed concerning the delay in receiving some shipments from Chicago, particularly in the winter in respect of commodities requiring protection from freezing. Consignee complained to Red Ball who is rendering single-line service to Lincoln, and discovered that carrier did not always have protective equipment available for daily service to Lincoln. Sometimes shipments requiring such protection were loaded in equipment moving to Omaha and at other times they were held in Chicago until such equipment was available for Lincoln. Carriers other than Red Ball provide protective service from Chicago, and Burlington in particular is willing to provide such service to consignee.

A large department store in Lincoln receives shipments from Chicago, Minneapolis-St. Paul, Denver, St. Louis, Kansas City, St. Joseph, and Des Moines. Most of the shipments are received collect. The stores advertising schedules and receipt of merchandise are coordinated and for this reason delays in transportation are avoided as much as possible. Various motor carriers are used for service from Chicago, including Red Ball, Watson, Freightways, and Haeckl. Red Ball transports most of the traffic from Chicago. Generally, it renders second and third morning deliveries, and service from that point, with some exceptions, has been reasonably satisfactory. Carriers used from St. Louis include Burlington and Watson. Generally, Burlington has provided second and third morning delivery

service which is satisfactory. Service from Kansas City is rendered by various carriers, including Red Ball, Watson, and Burlington. Red Ball transports most of its shipments from Kansas City and such service generally has been satisfactory. The service of other origin carriers from Kansas City has been satisfactory, with some exceptions. Freightways is used for most shipments from Minneapolis, and service from Minneapolis-St. Paul is reasonably adequate. Red Ball is used for shipments from St. Joseph, and, with some exceptions, the service has been reasonably adequate. The service from Des Moines and Denver also has been reasonably adequate. Consignee's representative is aware that shipments from Chicago, Minneapolis-St. Paul, Des Moines, and Denver, if transported in single-line service by applicant to Lincoln, would have to move through St. Joseph, providing a circuitous routing. Use of applicant's proposed operation would depend on its ability to render service comparable to that provided by existing carriers.

*Omaha*—A heating and air conditioning equipment contractor receives most of its traffic from Marshalltown, and occasional shipments from Kansas City, Chicago and Denver. It pays the freight charges on such shipments. Usually, most of the installations are made by consignee between May 15 and October 15 of each year. His storage space is limited and dependable motor carrier service is required for a continuous flow of merchandise. Normally, Bos is used to transport the shipments from Marshalltown to Omaha. Between May 1, and October 1, 1956, the Sheet Metal Workers Union placed certain pickets at the contractor's place of business and at certain job-sites where he was making installations. The pickets were not his employees or former employees. It is indicated that the contractor and his employees had refused to join the Sheet Metal Workers Union. Although Bos continued to deliver

these shipments to Omaha it would not make deliveries direct to the consignee because of the pickets. The consignee, therefore, used his own small truck and some of his skilled employees to pick up shipments at Bos' terminal in Omaha. He then endeavored to use I. X. T. from Marshalltown but that carrier's drivers would not make direct deliveries past the pickets either. Consignee is not aware of any single-line motor carrier service from Marshalltown to Omaha other than Bos and I. X. T. Railroad service has been used also but consignee was required to pick the shipments up at the rail carrier's freight depot. Since about October 1, 1956, Bos has been making deliveries direct to consignee's place of business because the picketing had ceased.

A manufacturer in Omaha, hereafter called shipper, makes various wood products, including frames for upholstered furniture, bases for television sets, and cabinets. Shipments are made to Chicago, Minneapolis, St. Louis, Kansas City, Des Moines, and Denver. Also, inbound shipments of various materials are received from these points. The above-described bases require continual expeditious transportation from Omaha for delivery in Chicago at certain times to coincide with production of the television sets. Cabinets also require expeditious transportation. Prior to October 18, 1956, shipper used numerous motor carriers, including Prucka, Watson, Freightways, Merchants, Independent, Ringsby, and Santa Fe Trail for service to and from its plant. Rail service is used for outbound carload shipments. Shipper, however, does not use less-than-carload service of the railroads very extensively. It prepays some outbound shipments. Shipper routes some inbound shipments, and others are routed by the suppliers. On or about October 11, 1956, a representative of the Upholsterers' International Union of North America, AFL-CIO, requested shipper to rehire certain employees who had been discharged. Additionally, the Upholsterers' Union re-

quested that its business agent be recognized as bargaining representative for shippers' employees. Apparently, the Upholsterers' Union had filed with NLRB unfair labor practice charges against shipper and no determination had yet been made on such charges, and no election had been held by the employees to certify that Union as their bargaining representative. On October 18, 1956, about 15 employees went on strike and approximately 85 continued working. Thereafter, drivers of the carriers which shipper had used formerly would not pass the picket lines to pick up or deliver merchandise. Shipper, therefore, had to engage local cartage companies to pick up or deliver its freight at terminals of the line-haul carriers. Shipper spent about $500 weekly in obtaining the service of local cartage companies. This situation continued until January 28, 1957, when the unfair labor practice charges were withdrawn by the Upholsterers' Union. Thereafter, the line-haul carriers resumed pick up and delivery service at shipper's plant.

A storage company operates two storehouses in Omaha. General commodities, with some exceptions, are stored for numerous shippers, including some nationally known tobacco manufacturers and certain packinghouses. Generally, the shippers' commodities are moved to the warehouse and reshipments are made from time to time therefrom to various destinations. In some instances, on both inbound and outbound traffic, the storage company is permitted to route shipments. Rail and motor carriers have been used to and from the warehouses, and prior to May 1956, the transportation service was satisfactory. The list of motor carriers which it has used includes Freightways, Watson, D. M. T., Brady, Prucka, Santa Fe Trail, Bos, Darling, Ringsby and Red Ball. In 1956, up until May 18, merchandise (not including household goods) received by motor vehicle at the Omaha storehouses approximated 7 mil-

lion pounds, and a substantial amount of this traffic originated in Chicago, Kansas City, St. Louis, and Minneapolis. Since about May 24, 1956, when a picket of Teamsters was placed at each of the storehouses in Omaha, deliveries by the line-haul motor carriers ceased generally, and only sporadic interstate shipments have been moved to the warehouses by for-hire motor carriers. In some instances shippers did not know there were pickets at the storehouses, and forwarded merchandise to Omaha. This resulted in the tracing of shipments to the terminals of certain carriers, and occasionally shipments had been moved to the storehouses of competitors. Prior to the placement of pickets, Teamsters had requested the storage company to pay its employees established union wage rates. The employees of the warehouses are not members of Teamsters and the latter did not represent them. The storage company has never been advised by the NLRB of any charges being filed with that agency by Teamsters. It had not instituted any action of its own with the NLRB.

Customers were informed of the situation in Omaha, and the storage company began using rail for inbound shipments normally transported by motor vehicle. On June 30, 1956, it lost the account of one large meat packer whose products had been stored in Omaha and reshipped to various points in Iowa, including Marshalltown, Cedar Rapids, Boone, Ames, Des Moines, Davenport, Carroll and Dennison. Because of the existing situation it is said that the storage company is placed at a competitive disadvantage. From time to time since May 24, 1956, it has attempted, without much success, to obtain normal service again direct to the warehouses by the described line-haul motor carriers. Recently, some meat products (which do not require refrigeration) have been transported satisfactorily from Chicago by W. N. Morehouse, Nelson Truck Line, and E. E. Haugarth. Apparently, however, these carriers are re-

stricted to the transportation of packinghouse products. In respect of outbound service, as recently as February 20, 1957, it attempted without success to obtain a pick up by some line-haul motor carriers of a small shipment of personal effects for transportation to Chicago. Generally, the drivers of the line-haul carriers have continued to refuse to pass the pickets at the storehouses.

A representative of the Nebraska Resources Foundation testified in support of the application. Generally, this organization is engaged in bringing in new industries to Nebraska. In recent years it has been instrumental in obtaining the establishment of new factories at certain points in Nebraska, including Lincoln, Kearney, Columbus, Hastings, and Fremont. When attempts are made to induce industries to locate in Nebraska the question of adequate transportation in and out of the new plant sites is important. This representative believes that the more transportation service Nebraska has available the better it will be able to compete with other areas for new industries.

The former owner of Independent, under subpoena by applicant, also testified. Prior to January 1956, Independent interchanged with certain carriers, including Abler, Clark, Lyon, McKay, and Romans. In fact, from January 1 to September 1, 1956, Romans leased terminal facilities from Independent at Omaha. In May of that year, however, Independent refused to interchange certain shipments with Romans. Witness recalled that he understood at that time that Romans was involved in a labor dispute and that the management of Independent was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it that was their own responsibility."

Galveston Truck Line Corporation, hereafter called Galveston Truck, intervened in support of the application.

That carrier holds certain certificates from this Commission in No. MC-8544 and subnumbers thereunder authorizing operations in interstate or foreign commerce as a motor common carrier, over irregular routes, of general commodities, with exceptions, from and to certain points and areas in Texas and Oklahoma. It is authorized also to transport specified commodities from and to certain points. In No. MC-8544 (Sub-No. 15) an application is pending before the Commission in which Galveston Truck seeks authority to extend its general commodity operations from and to certain points, including Kansas City, Kans., and the commercial zone thereof. Intervener, a nonunion carrier, is interested in and supports the instant application because it desires to interchange traffic with applicant at Kansas City if its own extension application is approved and applicant obtains the authority sought herein.

The testimony of an inspector at the Nebraska State Railway Commission was also offered by applicant. This testimony involved principally the service rendered by Portis between Grand Island and Ord. Portis interchanges interstate traffic at Grand Island with certain carriers, including Watson, and the evidence indicated that Portis does not render daily service between Grand Island and Ord.

Certain other consignees located at Arcadia, Norfolk, and Ord were present at the hearing in support of the application. It was stipulated by counsel that if called as witnesses their testimony both on direct and cross-examination would be the same or similar to that presented by other witnesses from the same points. If the authority sought is granted, the supporting shippers and consignees generally would route their traffic over applicant's line for connection with the operations of the stockholders, principally at Omaha and Grand Island.

EVIDENCE IN OPPOSITION TO THE APPLICATION.

Evidence in opposition to the application was offered by Burlington, D. C. T., Freightways, I. C. X., Independent, Interstate Motor, Navajo, P. I. E., Red Ball, Ringsby, Santa Fe Trail, and Watson. The evidence presented by these motor carriers also included testimony by representatives of Barber and Roy. On behalf of the railroads evidence in opposition was offered by the Chicago, Burlington and Quincy Railroad Company, Chicago and North Western Railway System, Chicago, Rock Island and Pacific Railroad Company, Missouri Pacific Lines, and Union Pacific Railroad, hereafter called C. B. & Q., C. N. W., C. R. I. P., Missouri Pacific, and Union Pacific, respectively. Each of the opposing motor common carriers hold certificates from this Commission authorizing the transportation of general commodities, with exceptions, in interstate or foreign commerce, between various points over specified regular routes. Collectively, the routes over which these motor carriers are authorized to operate coincides substantially with those described in the instant application, and they serve the principal points named therein. Freightway's operations almost completely duplicate those sought, except that it has no routes between Kansas City and St. Louis. Burlington operates between Omaha and Lincoln on the one hand, and, on the other, Chicago, St. Louis, Des Moines, Kansas City, St. Joseph, and Denver, and it serves numerous intermediate points, including Grand Island. Red Ball serves Omaha, Lincoln, and Grand Island, and numerous other Nebraska communities, and its routes extend from those points to Denver, Kansas City, St. Joseph, Chicago, and Sioux City. Watson also serves numerous Nebraska communities, including Grand Island, Norfolk, Fremont, Columbus, Omaha, and Lincoln, and its routes extend from those points to Minneapolis-St. Paul, Des Moines, Chicago, Kansas City,

St. Joseph, St. Louis and Denver. It also serves Marshalltown. It renders daily service from Omaha to Lincoln, Fremont, Columbus, Grand Island, and Hastings. Ringsby's operations between Denver and Chicago via Omaha and Des Moines, includes service to various Nebraska points, including Lincoln, Grand Island, Fremont, Norfolk, and Sioux City. Generally, however, unless Ringsby has a truckload for Norfolk, service to that point is rendered by interchange. Similarly, although Independent holds authority to serve Lincoln, it interchanges less-than-truckload shipments moving to or from Lincoln with connecting carriers at Omaha. Truckloads, however, are delivered to Lincoln direct. Freightways can render direct service between Marshalltown and Omaha.

Terminals are maintained by protestant motor carriers at various points in the area involved. Most of them have terminals at Denver, Omaha, Chicago, and Kansas City, and some have terminals at St. Joseph, St. Louis, and Lincoln. Certain of the carriers have terminals at St. Paul, Sioux City, Des Moines, Grand Island, the Freemont. Additionally, Watson has a terminal at Columbus, which is shared with another carrier. These protestants operate numerous motor vehicles including certain refrigerator equipment. Service is rendered daily by them between the principal points they are authorized to serve, and normally they use either a relay system or two drivers on a vehicle for continuous operation of their equipment between terminals. For example, Watson operates overnight schedules between Omaha, on the one hand, and, on the other Chicago, Denver, Des Moines, Kansas City, St. Louis, and Minneapolis-St. Paul; and second morning service between Chicago and Denver. Daily service is rendered from Chicago, St. Louis, Kansas City, St. Joseph, and Denver to Lincoln. Red Ball operates daily schedules between Chicago, on the one hand, and, on the other, Omaha,

Lincoln, Sioux City, and Denver; between Kansas City, on the one hand, and, on the other, Omaha and Lincoln, including service at St. Joseph; between Omaha and Denver, and Omaha and Sioux City. Overnight schedules are operated by Red Ball in the majority of instances, although it is apparent that operations between Chicago and Denver would take longer resulting in second morning or second day service. Service rendered by D. C. T. between Chicago and Denver, and between St. Louis and Denver is second morning or second day. Interstate Motor also offers second morning service between Chicago and Denver, and between Kansas City and Denver. Independent offers second morning service between Chicago and Denver, and so does Freightways.

Generally, the equipment of the opposing motor carriers is not being operated to capacity, and they are in a position to transport additional traffic. Interstate Motor transports more traffic westbound from Chicago and Kansas City to Denver than it does in the reverse direction. It is anxious, therefore, to obtain additional eastbound traffic from Denver. I. C. X. also desires to obtain additional traffic from Denver moving eastbound to balance its westbound operations from Chicago. Ringsby is interested, among other things, in obtaining additional traffic from Chicago and Denver into Omaha where it has established its own terminal. Representatives of the opposing carriers believe a grant of the authority sought herein would affect protestants adversely. Freightways, for example, suffered a decline in gross revenue in 1956 of about $200,000, and it made only a slight profit in 1956.

The opposing motor carriers transport a considerable volume of traffic between the points they serve and they interchange with connecting carriers at various points. Omaha is one of the principal points for interchange of traffic, and considerable interchange is performed at Lin-

coln, Grand Island, and Sioux City by certain of the opposing motor carriers. Certain of the evidence pertaining to interchange at Omaha, Lincoln, Sioux City and Grand Island is pertinent here. Burlington offered exhibits covering generally a period during the last six months of 1956, and January 1957. This evidence shows that Burlington has continued to interchange with applicant's stockholders at Omaha and Lincoln on interstate traffic originated at or delivered to various points in Nebraska. Specifically, numerous interstate shipments were received by Burlington at Omaha from McKay, Clark, and Abler, and some from Romans, Superior, and Lyon. Numerous interstate shipments were transferred at Omaha to Romans, McKay, Clark, and Abler. During the same period of time Burlington interchanged numerous interstate shipments with McKay and Lyon at Lincoln. Some of the shipments included in Burlington's exhibits cover shipments of certain supporting shippers or consignees, originating at or destined to Norfolk, Arcadia, Sargent, Ord, Fairbury, Neligh, and Burwell.

In 1955, and 1956, at Omaha, Santa Fe Trail interchanged interstate traffic moving from and to Nebraska points with Abler, Wilber, Clark, Peters, Lyon, McKay, Pawnee Transfer, Romans, and Steffy; also, with Superior Transfer, in 1956. In most instances Santa Fe Trail delivered considerably more traffic to these carriers than it received. During the same years at Lincoln it interchanged traffic with McKay, and in 1956, with Winter and Tillman.

A representative list showing a portion of the interstate shipments interchanged by Independent at Omaha during 1956 (except January) shows that most of the traffic was given to Roy for delivery to Norfolk, Pierce, Newman Grove, Neligh, Meadow Grove, and Tilden. Certain shipments for Ord, North Loup, and Loup City were transferred to Arrow. United Freight received some for

Loup City, Ord, and Burwell, and a carrier named Burnham received a shipment for Burwell. With respect to certain unrouted shipments for Norfolk and Pierce, which were transferred to Roy, examination by applicant's counsel of the freight bills covering such shipments revealed that "Abler" had been written thereon by Independent's routing clerk and then scratched over in favor of Roy.

An exhibit offered by Red Ball shows that it interlined approximately 430 shipments at Omaha in November 1956 destined to various Nebraska points which are served either by Abler, Clark, Lyon or Romans. All of these shipments, however, were given to carriers other than Abler, Clark, Lyon and Romans for delivery. The list of connecting carriers which delivered the shipments includes Schuyler Transfer, Interstate Freight Lines, and Mauch Transfer, hereafter called Schuyler, Interstate Freight, and Mauch, respectively, and Roy, Heuton, Brandt, and Service Oil. During the same month Red Ball received about 17 shipments collectively, from Roy, Schuyler, Interstate Freight, Mauch and Brandt, for movement to points beyond Nebraska.

A representative list of over 500 interstate less-than-truckload shipments interchanged at Sioux City by Watson on traffic moving to Nebraska points, from May 1, 1956 to and including January 31, 1957, shows Middlewest as the connecting carrier in most instances, with Barber and D. & T. Transfer, hereafter called D. & T., receiving some shipments. Many of the shipments originated at points on the routes over which applicant seeks to operate. Routings on about 40 of the shipments were disregarded by Watson and given to a carrier other than the one specified. During the same period of time Watson interchanged numerous interstate shipments at Omaha destined to points in Nebraska, and in certain instances disregarded the routings shown on the freight bill. Watson also offered

evidence showing interchange of 94 interstate shipments at Grand Island, between September 27, 1956 and January 16, 1957, destined to Ord. All of these shipments were transferred to Portis, although 21 were routed for delivery by Romans. In respect of service involving the supporting department store at Lincoln, during the last 8 months of 1956, a representative list shows Watson delivered directly to the store numerous shipments which originated at Kansas City, St. Louis, Minneapolis, St. Paul, Chicago, and St. Joseph, and the transit time in most instances was one or two days. An exhibit was offered also by Watson showing that it had transported numerous shipments originating at various points beyond Nebraska, including Kansas City, Chicago, Minneapolis, St. Paul, St. Louis, Denver, and St. Joseph directly to Columbus.

An exhibit of Freightways shows that this protestant from January 20 to September 4, 1956, interchanged over 900 less-than-truckload interstate shipments at Sioux City, and Omaha, collectively, destined to various points in Nebraska. A considerable amount of this traffic originated at numerous points on the routes over which applicant seeks authority, and the list of connecting carriers to which the shipments were given at Omaha and Sioux City includes Middlewest, Roy, Brandt, Schuyler, Interstate Freight, Arrow, Heuton, D. & T., Mauch, Superior, Wilber, Abler, Romans, McKay, and Steffy. Considering the number of shipments involved, applicant's stockholders received a small amount of traffic compared to that given to Middlewest, Interstate Freight, and some of the other connecting lines. Shipments to Fremont were transported directly to that point by Freightways. Although Freightways can serve Norfolk, O'Neill, Valentine, Columbus, Grand Island, Hastings, West Point, Neligh, and Schuyler, Nebr., on certain days it does not have sufficient freight to justify operation of a vehicle to those points and the traffic

is interchanged with connecting lines to expedite deliveries. Numerous shipments were transported by Freightways from Chicago, St. Paul, Denver, and Kansas City to the described department store at Lincoln, from July 30, 1956 through January 29, 1957; generally, transit time on the Chicago, St. Paul and Denver shipments ranged from two to three days, and the Kansas City shipments from one to three days.

Barber, since about January 2, 1957, has operated under the general commodity certificate formerly held by Middlewest in No. MC-30857. That certificate authorizes operation in interstate or foreign commerce over specified routes between Ainsworth, Nebr., and Sioux City, and between Neligh and certain other points in Nebraska. By certain recently acquired general commodity authority, Barber also operates between Valentine and Omaha over certain specified regular routes. It maintains terminals at certain points, including Omaha and Norfolk, and operates numerous vehicles. One of its vehicles leaves Omaha daily at about 5:30 p.m., for various Nebraska points it is authorized to serve.

Roy is authorized to transport general commodities, with exceptions, between Omaha and Norfolk over U. S. Highway 275; and between Columbus and Fremont, over U. S. Highway 30, serving all intermediate points. He is authorized also to transport general commodities, with exceptions, from "Norfolk and vicinity to and from Ainsworth, Nebr., and occasionally to and from points in the State of Nebraska at large", with certain restrictions. He operates six tractors, six trailers, and two trucks, and maintains terminals at Omaha, Norfolk, and Fremont. An exhibit offered in evidence shows that Roy received numerous interstate shipments at Omaha in December 1956, and in January 1957, from various carriers for movement to Nebraska points beyond Norfolk, and it transferred such shipments.

to Clark at Norfolk. In 1956, Roy received from various carriers at Omaha numerous interstate shipments destined to Norfolk which were delivered to that point directly by Roy. The witness representing Roy admitted that certain shipments transported to the Young Mens Christian Association in Norfolk have been refused because they had been routed for delivery by Clark.

As here relevant, C.R.I.P. operates over a network of rail lines extending from Chicago, on the east to Denver, on the west via Des Moines, Omaha, and Lincoln, and from Minneapolis-St. Paul, on the north to St. Louis and Kansas City, on the south. In addition to Omaha and Lincoln, it serves certain other points in southeastern Nebraska. It also serves St. Joseph. It renders daily merchandise car service between Chicago, on the one hand, and, on the other, Omaha, Denver, St. Louis, Kansas City, and Minneapolis-St. Paul; between Denver, on the one hand, and, on the other, St. Louis, Kansas City, and Omaha; and between Kansas City and St. Paul. C. N. W. as here material, operates over a system of rail lines extending from Chicago, on the east, to Lander, Wyo., on the west, via Omaha, Norfolk, and Chadron, Nebr., and from Minneapolis-St. Paul, on the north, to Des Moines, and Lincoln, on the south. Its lines also extend to numerous points in southeastern Nebraska, including Superior. Among other things, it operates through less-than-carload merchandise cars daily between Chicago and Omaha, and between Minneapolis-St. Paul and Omaha.

C. B. & Q., operates over a network of rail lines extending from Chicago, on the east to Denver on the west, via Omaha and Lincoln, and between Minneapolis, on the north and St. Louis, Kansas City, and St. Joseph on the south. In addition to Omaha and Lincoln, it serves numerous other points in various areas of Nebraska, including Grand Island. C. B. & Q., offers through less-than-carload

merchandise car service between Chicago on the one hand, and, on the other, Omaha, Kansas City, Minneapolis-St. Paul, and St. Louis; between St. Louis and Kansas City, on the one hand, and, on the other, Omaha and Denver; and between St. Joseph and Omaha.

Missouri Pacific's lines, as here relevant, extend from St. Louis to Omaha, Lincoln, and certain other points in southeastern Nebraska, via St. Joseph and Kansas City. This protestant operates two less-than-carload merchandise cars daily between St. Louis and Omaha; one merchandise car between St. Louis and St. Joseph daily, and at least one daily between Kansas City and Omaha. The above-named rail protestants handle carload as well as less-than-carload traffic between the points they serve, and interchange such traffic with connecting railroads for transportation to and from points between their own lines. They are ready, willing, and able to transport additional traffic. All of the points on the above-named protestants' rail lines pertinent to the instant application are not open and prepay stations.

Union Pacific's lines, as here pertinent, extend from Council Bluffs, Iowa, Omaha, Kansas City, and St. Joseph, on the east to Denver on the west. In addition to Omaha, it serves numerous points in Nebraska, including Lincoln, Grand Island, and North Platte. Although most of the Nebraska points it serves are open stations, some do not have any agent of their own and are served from another station nearby. Union Pacific operates scheduled freight trains between various points, including service between Council Bluffs (Omaha) and Kansas City, between Lincoln and St. Joseph, and between Council Bluffs (Omaha) and Denver. It interchanges traffic with other railroads at various points, including Council Bluffs, Kansas City, and Denver. In connection with other railroads, it participates in merchandise car service between Chicago and

Denver; between St. Louis, on the one hand, and, on the other, Omaha, North Platte, and Denver; St. Louis and Kansas City, and between Minneapolis-St. Paul and Omaha. It also renders merchandise car service on its lines between Denver and Kansas City, and between Denver and Omaha. It transports carload as well as less-than-carload traffic, and can render additional service of this nature.

BRIEFS.

In its brief, applicant argues principally that the free flow of interstate commerce via motor carrier has been obstructed and impeded through the failure and refusal of protestants and other unionized carriers to give the required service; that such obstruction deprives many Nebraska communities of needed interstate transportation service from or to manufacturing and distributing points outside Nebraska; that Omaha business concerns supporting the application are entitled to door-to-door service in order to remain in business on a competitive basis; that a formal complaint is not the only remedy available; that the application is based solely on public convenience and necessity; that the evidence shows there is a real demand and need for the proposed service; that when protestants and other line-haul carriers refuse to provide their respective portion of the through movement, the Commission has no alternative but to authorize another carrier who will perform the required service to enter the field, and that it is fit and able to conduct the motor carrier operations proposed.

In their briefs, protestants assert that the application be denied. They argue principally that applicant has not shown that the existing transportation service between the points involved is inadequate; that it has failed to prove the stockholders of applicant are unable to conduct

interchange operations with existing line-haul carriers; that, if applicant's allegations of refusal to interchange are true, a complaint should be filed by the stockholders with this Commission instead of an application for authority; that motor carriers are not enjoined by part II of the act to follow designated routings; that the matters involved herein are within the exclusive jurisdiction of the NLRB; that if applicant's stockholders are involved in alleged secondary boycott activities on the part of Teamsters, they have an adequate remedy in the courts and before the NLRB. It is contended further that the power to issue certificates granted by Congress to this Commission was never intended to authorize the establishment of a new carrier whenever the operations of existing carriers are involved in temporary labor disputes, and that grants of authority based on evidence of the sort presented herein would result in two types of carriers, union and nonunion. Rail carriers contend that they should not be confronted with another common carrier competitor operating along their principal routes simply because of the labor differences of several nonunion motor carriers serving various interior Nebraska communities. They also question applicant's fitness and ability to conduct the extensive operations sought.

## Discussion and Conclusions.

Before discussing the merits of the application the question of jurisdiction raised on brief should be resolved. The common carrier application here was filed under Part II of the Interstate Commerce Act for the issuance of a certificate which, if granted, would authorize applicant to transport general commodities, with exceptions, in interstate or foreign commerce, between various points. Section 206(a) of the Interstate Commerce Act prohibits any common carrier by motor vehicle from operating in interstate or foreign commerce unless and until it holds a cer-

tificate of public convenience and necessity from the Commission. Section 204 of the same act reads, in part, as follows:

> "(a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service • • •";

Section 202(a) of the act reads as follows:

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission."

Section 10(a) of the Labor Management Relations Act, 1947, usually referred to as the National Labor Relations Act, hereafter called Labor Act, reads in part as follows:

> "The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: • • •"

and under section 10(c) NLRB can issue an order and notice as set forth in appendix C hereto.

Of the 12 stockholders of applicant, Clark is the only one who has sought relief from NLRB, and is the only one who had employees on strike. The other stockholders have not sought relief from NLRB, do not have employees on strike, and certainly in respect of the application herein, as to them, there can be no valid claim that this Commission is injecting itself into the area of labor relations and collec-

tive bargaining. Such stockholders believe there is need for additional transportation service based principally on the refusal of certain line-haul carriers to interchange traffic with them. In addition to the testimony of the stockholders themselves, evidence was presented by certain public and shipper witnesses on the question of need for the proposed service. The subject matter here for consideration is an application under section 207(a) of the Interstate Commerce Act and disposition of the proceeding requires, among other things a determination of whether the service proposed in the application or any portion thereof is or will be required by the present or future public convenience and necessity, and deciding the issues therein by the Commission does not conflict with the decision in *Garner* v. *Teamsters Union*, 346 U. S. 485, where it was held that the grievance of a trucking company against picketing by Teamsters (Local 776) was a matter to be decided by NLRB and not by a State tribunal. In that proceeding a State labor board was endeavoring to occupy the same field in which the NLRB is engaged. Where transportation is involved under the Interstate Commerce Act, however, and the duties of common carriers thereunder are involved with respect to the service rendered to the shipping public, it is clear that the Labor Act did not give NLRB exclusive power, particularly where the statute of another regulatory body is violated. *Quaker City Motor P. Co.* v. *Inter-State Motor Fr. Sys.*, 148 F. Supp. 226. Reference to appendix C hereto (the NLRB order) shows Teamsters are directed to cease and desist from certain secondary boycott activities against Clark "or any other common carrier by motor vehicle in the area" over which Teamsters Local 554 has jurisdiction. In other words, the protection afforded to Clark by the NLRB order against secondary pressures was extended to other motor carriers in the area which the union was attempting to organize.

The fact that NLRB has issued an order in this matter, however, does not preclude the Commission from considering whether additional motor carrier facilities are needed, or other action should be taken under the Interstate Commerce Act because of the interchange difficulties in which certain of applicant's stockholders are involved. The NLRB order directs a union local to cease and desist from certain activities. A Commission order would be directed to an interstate motor carrier or carriers. See *Montgomery Ward & Co.* v. *Santa Fe Trail Transp. Co.*, 42 M. C. C. 212, discussed elsewhere herein. The examiner concludes that the Commission has jurisdiction properly to consider the transportation matters involved in the instant application.

Before the Commission may grant a certificate of public convenience and necessity under section 207(a), it is necessary to consider, among other things, (1) whether the new operation or service will serve a useful purpose, responsive to a public demand or need; (2) whether this purpose can and will be served as well by existing lines or carriers; and (3) whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. *Pan-American Bus Lines Operation*, 1 M. C. C. 190, 203. Any order authorizing such a certificate would have to include a finding to the effect that there was no existing service in operation between the points or over the area applied for or that such service was inadequate or that existing carriers could not furnish and are not satisfactorily furnishing the service required. *Inland Motor Freight* v. *United States*, 60 F. Supp. 520. It is clear from the facts in the instant proceeding that this application is not based on the usual evidence presented in proceedings of this kind. Some protesting unionized motor carriers have refused to interchange traffic with

certain stockholders of applicant who are not unionized, and it is applicant's position that this constitutes an inability or unwillingness on the part of existing carriers to provide adequate and reasonable service to the shipping public in the involved territory. Applicant cites a number of cases in its brief to sustain the claim that the unionized line-haul carriers, including protestants, are unable or unwilling to provide service, notably *Meier & Pohlmann Furniture Co.* v. *Gibbons*, 113 F. Supp. 409, 233 F. 2d 296; *Montgomery Ward and Company, Inc.* v. *Santa Fe Trail Transp. Co., supra;* and *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M. C. C. 719.

As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with the stockholders named herein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging traffic with a considerable number of the line-haul motor carriers. In any event, most of Peters' interchange at Omaha is effected with National Carloading. As to Abler and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D.M.T., and Merchants. As to Clark, the evidence shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder has been able to find a motor carrier willing to accept interstate shipments.

Although the shipper evidence relating to interior Nebraska points indicates there have been some delays in transit, principally because shipments have been diverted

to carriers other than those designated by the consignees, the shipments have been moving through to destination. There is a question, however, what effect this diversion of traffic which has taken place within Nebraska, has on the issue of public convenience and necessity involved herein.

Although Part II of the act does not specifically grant to shippers the right to designate the routes by which their property should be transported by motor common carriers, such carriers are charged with the duty under section 216(b) of the act, to establish, observe and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and it has been held that misrouting is an unreasonable practice under certain conditions. *Eastern Aircraft* v. *Fred Olson & Son Motor Service Co.*, 47 M. C. C. 363. *Metzner Stove Repair Co.* v. *Ranft*, 47 M. C. C. 151. In the latter case the shipper had specified a certain interchange carrier but the originating carrier had ignored the routing which resulted in shipments being transported over another route at a higher rate. A consignee who exercises control over shipments is a shipper. *United States* v. *Metropolitan Lbr. Co.*, 254 Fed. 335. Part I of the act, section 15(8), dealing with the railroads, specifically provides that shipper routings must be observed, and section 15(9) gives a cause of action to the rail carrier who suffers a loss of traffic by misrouting. The examiner is informed on protestants' briefs that there is presently pending in Congress a bill which would so amend Part II of the act as to specifically provide, as is now provided in Part I of the act, that a motor carrier subject to Part II must observe and follow shippers' specified routings. If legislation to this effect is passed, such a statute should help correct the misrouting abuses revealed herein. Presently, however, the carriers injured by misrouting can file a complaint, where it could be determined whether the practices

alleged are just and reasonable. In any event, since the Commission has not had an opportunity to pass on these misrouting practices as they affect the particular stockholders involved, it is illogical to assume that the Commission can do nothing by way of a complaint proceeding. If nothing can be done in that manner, then other steps could be taken. In the meantime, however, considering the circumstances involved, and in the absence of specific legislation under Part II regarding misrouting, an extensive grant of operating rights between Omaha and Lincoln, on the one hand, and, on the other, Chicago, Denver, St. Louis, St. Joseph, Minneapolis and Des Moines would not be justified, particularly since the diversions or misroutings have taken place principally within Nebraska.

In regard to the shipper evidence relating to Lincoln, the facts show that the existing carriers generally are giving good service to the involved retail stores, and there is no substantial basis to authorize additional motor carrier service to or from that point.

As to Omaha, the evidence shows, with respect to the air-conditioning contractor, that Bos has been making deliveries direct to consignee's place of business since about October 1, 1956, and that picketing at the contractor's place of business had ceased. Similarly, after January 28, 1957, the line-haul carriers resumed pickup and delivery service at the manufacturer of frames for upholstered furniture when the Upholsterers' Union withdrew its charges of unfair labor practices. Thus, as to these business establishments no need has been shown for the additional service proposed.

In regard to the warehouse operator, the evidence shows its premises were still picketed by Teamsters. In the *Meier & Pohlmann* case, *supra*, a furniture company in St. Louis was involved in a strike of its workers which belonged to a union certified by NLRB. The strikers set up a picket

line. Thereafter, pickup and delivery service by carriers practically ceased. The motor carrier defendants there claimed that they were excused from furnishing pickup and delivery service by their impracticable delivery tariff. This tariff in substance stated that there was nothing therein which would require the carrier to perform pickup or delivery service at any location from or to which it is impracticable, through no fault or neglect of the carrier, to operate vehicles because of "any riot, strike, picketing or other labor disturbance." The Court pointed out that it was not concerned with the question of the validity of the tariff but only with the construction and interpretation thereof. After an appraisal of the evidence, the court concluded that the defendant carriers were excused from performing the pickup and delivery service to which plaintiff therein claimed it was entitled. In making this determination the court stated: "Because of the foregoing conclusion we do not reach the question of whether a proper construction of the impracticable operation tariff would excuse performance by the carriers if only peaceful picketing had been present or had been involved." The facts in that case had indicated there was some violence and peace disturbance during the existence of the picketing. The action therein included a request for a permanent injunction and it was indicated that under the Norris-LaGuardia Act it was necessary to show, among other things, that unlawful acts had been threatened and would be committed unless restrained or that such acts had been committed and would be continued unless restrained.

In the instant proceeding while the facts indicate that the warehouse operator in Omaha has been the subject of organizational or recognition picketing and there has been no strike of its employees, it is apparent that a labor dispute is in progress in which Teamsters seek to have the employer pay established wage rates. In *Garner* v.

*Teamsters, supra*, where Teamsters had resorted to organizational picketing to induce a storage and transfer company in Pennsylvania to join the union and "gain union wages, hours, and working conditions", the Supreme Court concluded that Teamsters were subject to being summoned before the NLRB to justify their conduct, and that on the basis of the allegations the Pennsylvania storage company could have presented its grievance to the NLRB. In that case picketing was orderly and peaceful, but drivers for other carriers refused to cross the picket line. A motor common carrier of freight, in interstate or foreign commerce, has certain duties and responsibilities toward the public. It is under a duty to shippers to furnish service under its tariffs to the limit of its capacity to do so upon reasonable demand. *Minneapolis & St. L. Ry. Co.* v. *Pacific Gamble Robinson Co.*, 215 F. 2d 126. Whether the line-haul carriers in the instant proceeding are violating their common carrier duty in not performing pickup and delivery service is properly the subject of a complaint proceeding. In *Montgomery Ward Co., Inc.* v. *Santa Fe Trail Transp. Co., supra*, a complaint proceeding, it was found that refusal by certain motor carriers to make pickups and deliveries was unlawful and in violation of section 216 of the act. In that proceeding, however, picketing was resorted to for the sole purpose of forcing a shipper to patronize a particular carrier. Montgomery Ward in Kansas City had terminated its contract with a local transfer company and entered into a new one with Railway Express for transportation of local mail and miscellaneous freight. The drivers of the express company were members of one union and the drivers of the transfer company were members of Teamsters who established a picket line simply because the transfer company lost its contract. The warehouse operator in the instant proceeding has taken no action before this Commission in the way of a complaint, and

evidently has not requested any action by NLRB. In addition to these regulatory agencies, it has recourse to the courts for an injunction. See *Quaker City Motor P. Co.* v. *Inter-State Motor Fr. Sys., supra.* Its traffic is getting through to its warehouses by railroad, and it also receives some direct delivery service by motor carriers of specific commodities. In the circumstances, the evidence with respect to proposed service to and from Omaha does not justify any grant of additional authority.

As previously indicated, there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that the real parties in interest who are aggrieved by this practice should file a complaint with this Commission under Part II of the act. In any event, since no complaint has been filed by any of applicant's stockholders with this agency, the Commission has not had an opportunity to test the effectiveness of that procedure. Certainly it cannot be assumed that the Commission's procedure thereunder would be ineffectual. Although applicant cites the *Planters Nut* case, *supra,* to sustain its argument that additional motor carrier authority is needed to correct the situation, it should be borne in mind that that was a complaint case and the Commission issued an order requiring certain specified carriers to cease and desist from certain interchange practices found to be unlawful. In the instant proceeding, for a certificate, those aggrieved by the practices of abnormal interchange conditions are not separated from those that have no complaint, and, if a certificate is granted on the evidence herein those protesting carriers who have been continuing to interchange normally would be injured along with those who have not conducted normal interchange with certain of applicant's stockholders. On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to

the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic involved. On the contrary, they are transporting the traffic over their respective portions of the routes involved and the shipments are moving through to destinations.

The examiner concludes that the application should be denied. In view of this conclusion, it is not deemed necessary to discuss the question of applicant's fitness and ability to conduct the proposed operations. Also, in view of this conclusion the examiner does not deem it necessary to discuss the necessity of the involved stockholders seeking approval under section 5 of the act to control applicant through ownership of stock or otherwise. Furthermore, since denial of the application is recommended it is not necessary to consider what effect a grant of operating rights would have on certain of applicant's stockholders who operate under the second proviso of section 206a of the act and are presently permitted to handle interstate traffic solely within Nebraska without a certificate from this Commission.

FINDINGS.

The examiner finds that applicant has failed to establish that the proposed operation is required by the present or future public convenience and necessity, and that the application should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By Donald R. Sutherland, Examiner.

(Signature) Donald R. Sutherland.

No. MC-116067

Appendix A (to Sutherland Report).

Nebraska Short Line Carriers, Inc.

DESCRIPTION OF AUTHORITY SOUGHT.

Authority to operate as a common carrier, over regular routes, transporting: General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30 to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Missouri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66, thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S.

Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph, Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

## Appendix B (to Sutherland Report).

APPLICANT'S COMMON CARRIER TEMPORARY AUTHORITY IN No. MC-116067 (SUB-No. 1) TA.

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, over regular routes.

Between Omaha, Nebr., and Chicago, Ill., with interline privilege at Omaha:

From Omaha over U. S. Highway 6 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route.

Service is not authorized at intermediate points.

Between Omaha, Nebr., and St. Louis, Mo., with interline privilege at Omaha:

From Omaha over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, and thence over U. S. Highway 40 to St. Louis, and return over the same route.

Service is authorized at the intermediate point of Kansas City, Mo., except on shipments moving to or from St. Louis.

## Appendix C (to Sutherland Report).

### Copy of National Labor Relations Board Order and Notice.

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 554, AFL-CIO, its officers, representatives, agent, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, or (2) to force or require Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, to recognize or bargain with Respondent as the collective bargaining representative of their employees, respectively, unless and until the Respondent has been certified as the representative of such employees in accordance with the provisions of Section 9 of the National Labor Relations Act;

(b) Engaging in any or all of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Forthwith notify all its members who are employed by employers other than Clark Bros. Transfer Company and Coffey's Transfer Company, and all employees of said employers who are represented by it, that it has no objection to their transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company. Such notice shall be in addition to that conveyed by the posting of the notices specified in paragraph (b), below;

(b) Post at its business office at Omaha, Nebr., copies of the notice attached hereto as an Appendix[11].

11. In the event that this Order is enforced by a decree of a United States Court of Appeals, this notice shall be amended by substituting for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

NOTICE TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, GENERAL DRIVERS AND HELPERS LOCAL 554, AFL-CIO.

PURSUANT TO

A DECISION AND ORDER.

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which we have jurisdiction, or (2) to force or require Clark Bros. Transfer Company or Coffey's Transfer Company, or any common carrier by motor vehicle in the area over which we have jurisdiction to recognize or bargain with the undersigned union as the representative of their employees unless and until certified by the National Labor Relations Board.

WE WILL NOT engage in any of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

WE HAVE NO OBJECTION to the action of the employees of any employer other than Clark Bros. Transfer Com-

pany and Coffey's Transfer Company in transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company; and we will give specific notice to that effect to all our members who are employed by any such employer and to all other employees of such employers who are represented by us.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, GENERAL DRIVERS AND HELPERS LOCAL No. 554, AFL-CIO.

By .....
(*Representative*) (*Title*)

Dated .....

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent's official representative shall also sign copies of the said notice which the Regional Director shall submit for posting, the employers willing, at the premises of Clark Bros. Transfer Company and Coffey's Transfer Company (if it resumes operations), and at the Omaha premises of the other

employers named in footnote 38 of the Intermediate Report[12];

(c) Notify the Regional Director for the Seventeenth Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., December 26, 1956.

BOYD LEEDOM,
*Chairman,*

PHILIP RAY RODGERS,
*Member,*

STEPHEN S. BEAN,
*Member,*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

Recommended by Donald R. Sutherland, Examiner,

(Signature) DONALD R. SUTHERLAND.

12. There shall be inserted in the caption of said notices, following the name of the Respondent, the words "And to All Employees of" followed by the name of the employer at whose premises the said notice is to be posted.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the ..... day of ..... A.D. 1957.

No. MC-116067.

NEBRASKA SHORT LINE CARRIERS, INC. COMMON CARRIER APPLICATION.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

IT IS ORDERED, That the said application be, and it is hereby, denied.

AND IT IS FURTHER ORDERED, That this order shall be effective on .....

By the Commission, division 1.

HAROLD D. McCOY,
*Secretary.*

(SEAL)

## APPENDIX D.

No. MC-116067 (Sub-No. 2)

NEBRASKA SHORT LINE CARRIERS, INC.

COMMON CARRIER APPLICATION.

REPORT AND ORDER.

RECOMMENDED BY MICHAEL B. DRISCOLL, *Examiner.*

Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., by application filed January 10, 1957, as amended, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities (except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk, those requiring special equipment, and stone, cut or uncut, finished or in the rough), between Omaha, Nebr., on the one hand, and, on the other, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

Under appropriate orders, the application was heard at Omaha, April 4-5, 9-12, and 15-17, 1957. The application is opposed by numerous rail carriers, by a relatively large number of motor carriers, and by General Drivers and Helpers Union, Local 554, of Omaha, affiliated to International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, A. F. L.-C. I. O.

Certain motor carriers are referred to herein by abbreviated names. Those names and the corresponding full names will be shown below. Unless otherwise shown herein, all those are motor common carriers of general commodities, with more or less standard exceptions, and all operate over regular routes.

| Abbreviated Name: | Name of Carrier: |
|---|---|
| Romans | John Jack Romans |
| Clark | Fred L. and Walter F. Clark |
| Abler | Abler Transfer, Inc. |
| Burlington Truck | Burlington Truck Lines |
| Santa Fe Trail | The Santa Fe Trail Transportation Company |
| McKay | C. C. and Earl R. McKay |
| Lyon | Royal F. Lyon |

All rulings on appearances, motions, amendments, and objections have been reviewed and further considered, and they are hereby affirmed.

All evidence has been studied and weighed. No one would be helped and no good nor useful regulatory purpose would be served by writing down all that voluminous evidence. Instead of all that, the intermediate or ultimate facts will be stated in most instances; and, from those facts, first preliminary and then ultimate conclusions will be drawn. For reference purposes, numbered divisions will be used.

1. Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through or to that centrally located city.

2. All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union. Those

Teamster contracts almost invariably contain the so-called hot cargo provisions, which read:

"It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs or lockouts exist.

The term 'unfair goods' as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement.

The Union shall give the Employer notice of all strikes and/or the intent of the Union to call a strike of any Employer and/or place of business, and/or intent of the members to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the pos-

session of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier.

The insistence by any Employer that his employee handle unfair goods or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operations without any need of the Union to go through the grievance procedure herein."

3. Differing from those larger trunkline carriers, are a number of small, or relatively small, eastern Nebraska motor carriers, which are not unionized, and which use Omaha as a principal or important interchange point with the larger unionized carriers. Some may also use Grand Island or Lincoln, Nebr., Sioux City, Iowa, or possibly other places as points of interchange, but all or practically all use, and logically must use, Omaha for much or most of their jointline traffic.

4. As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in those eastern Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Ahler, were not approached until early 1956. It is obvious from this record that the Union was not very successful; that, in most cases the employees did not respond; and that in every instance the carriers were more than reluctant to accept unionization.

5. The Clark situation is somewhat different from that of other eastern Nebraska carriers, so that it will later be considered separately.

6. Having no satisfactory success in the eastern Nebraska field, the Union apparently and very probably

started at the other end and began to work through the unionized carriers and put the pressure indirectly on the eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln, and Grand Island.

7. While some Omaha trunkline carriers did not freely admit that their interchange practices after May 1956, had been materially different from earlier practices, some others freely admitted they had not been able to interchange with eastern Nebraska carriers in the same free and open way they interchanged prior to May 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May 1956, a deterioration in interchange relationships and a rise in interchange difficulties.

8. The conclusions of Paragraph 7 are heavily confirmed by the testimony and exhibits of a number of the eastern Nebraska carriers. Example after example was recited with convincing sincerity, and surely no one could seriously contend that the firm declarations of these carriers were not well founded upon actual experience. The conclusions of Paragraph 7 must therefore be accepted as correct and conservative.

9. It should be stated that the attitudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe Trail, accepted almost all traffic offered. But even those carriers

did not maintain the same free and open interchange practices in effect before May 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not provide normally acceptable service for much or most of the traffic which these eastern Nebraska carriers would normally have handled.

10. The record shows beyond any reasonable doubt that, so far as those eastern carriers were involved, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May 1956. And there could be no reasonable doubt that, as a direct result, those Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers. A few examples of the effects will suffice. In 1955, about 20 percent of McKay's traffic was interstate, while now probably not over 10 percent is interstate. Abler's gross revenue fell about $70,000 in 1956, and its interstate traffic fell from 60 percent of the total traffic to 40 percent. Incidentally, Abler used to have an appreciable amount of interstate traffic through Sioux City, Iowa, but has given up that gateway temporarily, assertedly because of Union pressure. Romans' February 1957 gross revenue was $3,000 less than its February 1956 revenue. Lyon's total traffic used to include from 18 to 20 percent interstate, but now it is almost wholly intrastate.

11. Faced with that problem, some of the eastern Nebraska carriers got together and formed applicant corporation. No point would be made by reciting the preliminary or intermediate steps in that transaction. The principal theory of the corporation is that, as a carrier based at

Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond.

12. As a corporation, applicant has now no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a Union contract containing any hot cargo provisions. It is so firm on that point that it offered, through an amendment, to have any issued certificate contain a provision to the effect that, if it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation.

13. Applicant was originally organized as a Nebraska Corporation June 14, 1956, and was reorganized January 7, 1957. Its principal office is at Lincoln. Its authorized stock consists of 1,000 shares of common and 5,000 shares of preferred stock, all shares having a par value of $100 each. Outstanding stock consists of one share of preferred and 375.5 shares of common stock. With a minor exception of a half share of common, all outstanding stock is held by eastern Nebraska carriers, no one of which holds over 51.5 shares. There are now 12 stockholders. There are three officers and those, with two other persons, form the present board of directors. All those officers and directors are eastern Nebraska carriers or officials of such carriers.

14. The corporation was formed for the purpose of operating as a motor common carrier of general commodities, with exceptions. Applicant first sought, and obtained, certain temporary authority. That authority was granted in No. MC-116067 (Sub-No. 1) by order of the Commission, division 1, entered December 4, 1956. A joint petition in opposition thereto was filed by four motor carriers, and that petition was denied by order of the Commission, entered February 25, 1957. In the meanwhile, compliance by applicant having been made, the Commission, by telegram of January 3, 1957, authorized applicant to operate

under that authority until June 30, 1957. That authority covers general commodities, with exceptions, over specified routes, between Omaha and Chicago, with interline service at Omaha and with no service at intermediate points, and between Omaha and St. Louis, with interline service at Omaha and with service at the intermediate point of Kansas City, Mo., except that the Kansas City authorization does not include shipments moving to or from St. Louis. While operations under that authority could have been commenced January 3, 1957, they were not commenced until shortly after March 1, 1957. The explanation of that delay is that, for reasons not disclosed, applicant's counsel advised against operations prior to that time. While there was no showing of traffic volume or number of trips, the record as a whole shows rather conclusively that operations under that authority have been at least rather substantial.

15. Under an application filed June 22, 1956, in No. MC-116067, applicant is seeking a certificate for general commodities, with exceptions, over a number of specified routes, principally between Denver, Colo., and Chicago, Ill., via Omaha, with service at all intermediate points. Hearing on that application was closed February 25, 1957. It should be noted that, as to points and commodities, the instant application would include everything in that application. The only material difference would be that this is for irregular route authority while that is for regular route authority.

16. Applicant has employed an able and experienced general manager, and it is more or less leaving it up to him to plan, institute, and maintain operations and services under this relatively broad application. No detailed plan was disclosed. Applicant asserts it would be a simple matter to provide the proposed service. As to possible backhaul traffic, it was admitted that this would be something of a problem. One statement was that, if service

were asked for a shipment from a distant outlying point to Omaha, an attempt would be made to solicit a load from Omaha to that outlying point or to some point near it. The appearances and indications are that some reliance would be placed on exempt commodities for backhaul. A statement on that subject was made to the effect that, if a load were moved from Omaha to Santa Fe, N. Mex., for example, it might be necessary to move the unloaded truck to a Rio Grande Valley point or to southern California for a return load. While no finding need be made on this subject, it seems to be a fair statement to say that an operation based on Omaha and covering so many States would, particularly as to less-than-truckload traffic, present a lot of difficult operational and service problems.

17. Although it states it might buy equipment if that were later deemed necessary, applicant has so far used only leased equipment. All appearances are that it would continue the use of leased equipment into the indefinite future. A number of eastern Nebraska carriers have declared their readiness and willingness to lease certain other equipment to applicant. Equipment is also available for leasing from other sources.

18. Applicant now has terminal facilities at Omaha and Chicago and it apparently has such facilities at Kansas City, Mo. Attempts are being made to obtain such facilities at St. Louis, Mo. Not much was said about future terminals.

19. Applicant's present employees consist of a general manager and an office employee at Omaha and a solicitor at Kansas City. Accounts are looked after on a part-time basis by a certified public accountant. There are no drivers carried on the rolls, because the lessors of equipment either drive their leased equipment or provide a driver with their equipment.

20. Applicant submitted a balance sheet as of March 31, 1957. That shows total assets of $29,340.46 and current assets of $26,213.06. Current liabilities were $3,514.90. The capital stock account was $37,550, and the earning deficit was $11,724.44. That left a net worth of $25,825.56. An operating statement for the period from June 14, 1956, through March 31, 1957, shows revenue of $5,220.06 and expenses of $16,944.50 and a deficit of $11,724.44. Applicant explains that operations were not started until about March 1, 1957, and that expenses were sharply increased by expenditures for organizing the corporation and preparing it for operations. It contends that, with the authority sought, it could wipe out the deficit and get on a profitable basis. It also explains that additional funds could be raised by selling more stock.

21. A number of possible technical difficulties were pointed out at the hearing. One theory was that, since applicant's stockholders are owners or part owners of other motor carriers, section 5 of the act might be involved. Another theory advanced was that some stockholder carriers operate under registration of Nebraska certificates and that their stock holdings might have the effect of placing themselves in position where they would have to choose between their registration right and their right to hold stock in applicant corporation. Still another difficulty was argued from the fact that, if successful under both pending applications, applicant would have to the extent of duplication both regular and irregular route authority. Applicant declares that, if found necessary, section 5 applications would be filed. These asserted difficulties are technical in nature. They should not be considered as reasons for denying this application. If applicant is otherwise found fit and able and if it is found that public convenience and necessity require any part of this proposed operation, these technical matters should then

be studied and applicant should then be given an opportunity to overcome any obstacles that may arise from those matters.

22. The principal and most important evidence in support of this application comes from representatives of the 12 stockholders of applicant, which are eastern Nebraska carriers. From an earlier study of that evidence, along with all other evidence, it has already been concluded that, as a result of Union pressure on trunkline carriers, all those 12 carriers suffered some inconvenience and some damage from the action, inaction, or failure of those trunkline carriers in their interchange practices with those eastern Nebraska carriers.

23. When the evidence of those 12 carrier representatives is carefully and fairly examined, it must be said that not one of them complained of interchange conditions or of connecting line services in existence prior to the rise of Union pressure in early 1956. In other words, not one of them showed or even alleged that when conditions were normal they then had a need for a new or additional connecting line at Omaha. All their complaints are, in fact, bottomed on the rise of Union pressure. On the contrary, some of the leading figures in this enterprise admitted that, up to May 1956, everything in the way of interchange practices and connecting line services had been all right. For example, Lyon, the treasurer and a director of applicant, admitted his business was normal before February 8, 1956. Leonard Abler, a director, admitted his business had been normal up to May 1956. Romans, president and director of applicant and the principal carrier witness therefor, specifically admitted that his connecting line arrangements and practices had been satisfactory up to May 7, 1956. The only logical, reasonable, and fair conclusion from all that evidence is that, so far as those carriers are of concern, everything had been all right up to early 1956 and would

be all right again if the interchange practices and carrier services of trunkline carriers went back to their normal standards maintained before these Union difficulties arose.

24. As already noted, the Clark situation is somewhat different from that of other eastern Nebraska carriers. Clark started its business in 1938, under authority obtained from the Nebraska regulatory agency, and that authority was subsequently registered with this Commission. As a result of a proceeding before this Commission, a certificate, in lieu of registration, was issued to Clark on April 4, 1957. Clark's system of routes lies in northeastern Nebraska. Those routes extend from Lincoln, Omaha, and South Sioux City, Nebr., to such Nebraska points as Fremont, Columbus, Grand Island, Norfolk, Butte, and Ainsworth. It has terminals at Omaha and Norfolk. Like the other eastern Nebraska carriers, its difficulties arose from labor causes, but they arose earlier. After some labor negotiations, which need not be recited, four driver employees left the Clark organization at Omaha on September 14, 1955, and picketing of the Clark Omaha terminal immediately followed. As a result, interchange business with Omaha trunkline carriers fell to almost nothing. Clark's attorneys soon thereafter took that problem up with National Labor Relations Board. There were several resulting proceedings before that Board and before Federal Courts. Despite all that, these matters have never been completely settled, at least to the satisfaction of Clark. A contempt citation is still pending before the Court, and the Clark Omaha terminal is still being picketed. The interchange situation was rather acute until about July 30, 1956, when some improvement began to develop. Further improvement developed after November 1956. But the situation was never completely normal, not even up to the opening day of this hearing. There would be no point in detailing all the legal steps taken by Clark or on behalf of Clark, because those

controversies could not be fairly nor intelligently resolved here. The fact here is that the troubles of Clark arose from labor relations, and that the damage to Clark has been very severe. Its gross revenue fell from $262,000 in 1954 to about $217,000 in 1956, and its interstate traffic fell from 30 percent of its total traffic in 1954 to about four percent in 1956. But here again there is no showing nor even an allegation that the interchange practices or services of Omaha trunkline carriers were inadequate or even unsatisfactory prior to September 14, 1955. A logical, reasonable, and fair conclusion is that, if the labor difficulties complained of had never arisen, there would have been no complaint and no just basis for a complaint against Clark's connecting carriers.

25. In fairness to those eastern Nebraska carriers, it should be said that a few of them advanced the idea that, even if all labor problems were resolved and even if all truckline interchange practices went back to normal, there could be no assurance that labor problems might not arise again. While there is little history of past labor relations, the Abler witness declared his company had experienced similar difficulties three times before. In other words, the theory is that applicant could be used as a safeguard against the effects of possible labor difficulties in the future.

26. As further support for this application, applicant presented representatives of a number of possible users of the proposed service. Three of those possible users have been experiencing labor difficulties right at their own places of business. For that reason, their problems will be considered first.

27. Two related companies, using the same Omaha plant, will be referred to here as the Chardon Companies. Together, they manufacture a number of furniture items. Sales are made at numerous points in 29 States, most of

which are included in this application. Raw materials and supplies are received from one to several points each in 23 States, all of which are included in this application. The yearly volume averages 3 million pounds out and 3.5 million pounds in. Most of the outbound and much of the inbound traffic is controlled by the Chardon Companies. Truck service is used for 75 percent of the outbound and for 40 to 50 percent of the inbound traffic. It is admitted that service was all right until October 18, 1956, when a relatively small number of its 70 to 75 employees failed to show up and apparently went out on a strike. Shortly afterward, a picket line was formed around the plant. There were a few incidents of roughness, such as air being let out of workers' automobile tires and a flare being thrown through the window of the plant office. The police department could not determine whether the flare had been lighted. It should be noted that this labor difficulty was with the upholsters' union. As a result of that difficulty, the Chardon Companies encountered trouble in getting trucking service for its in and out freight. In the meanwhile, the labor trouble has disappeared, and normal service has been available since January 28, 1957. There is no showing nor contention that the service normally available is inadequate or would be for the future. The Chardon Companies have been using applicant's temporary service, along with the services of other carriers. In support of this application, they say that it would be a benefit to them to have many lines serving their plant and that, in case of more labor trouble, applicant's service would be very useful.

28. Ford Storage & Moving Company and Ford Brothers Van and Storage Company are family corporations, controlled by the same persons. Their problems will be considered together. They own two warehouses at Omaha and one warehouse at Council Bluffs, Iowa. Their

problems exist only at Omaha. They own some trucks and do local cartage work for the public, in and around Omaha. One principal function of these companies is to provide storage for all classes of merchandise, except such items as require cold storage. In connection with that important part of their business, they normally have a heavy movement of freight both in and out. From 1952 through 1956, the inbound volume ranged from the equivalent of 575 to 779 carloads. Indications are that the outbound volume is relatively large but substantially smaller than the inbound volume. Representative origins of inbound traffic are Chicago, Ill. Durham, N. C., Cincinnati, Ohio, Sioux Falls, S. Dak., and Beloit, Wis. Destinations of outbound traffic are principally in Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado. On inbound traffic, rail service has always been heavily used, but there has been a growing tendency toward truck service. By early 1956, about 60 percent of the volume was coming in by truck. On outbound traffic, truck service is even more extensively used. Normally, the Ford Companies control outbound and the shippers control inbound traffic. These companies have never been unionized; they do not wish to be unionized; and they have never taken their problems up with National Labor Relations Board. Everything in transportation was all right here until early 1956, when the Teamsters Union began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford warehouses. They were still there at the time of this hearing. After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses and some apparently would not do busi-

ness with these companies. For about a month, during the early days of the picket line, even the train crews declined to serve the warehouses. In that state of emergency, the Ford Companies made arrangements to rely more extensively upon rail service, particularly into Omaha. That is not an ideal solution, and it is only a partial solution of the problem. In addition to the inconvenience and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All those transportation troubles came directly or indirectly from labor difficulties. The Ford Companies admit that their service situation prior to May 1956 was adequate and satisfactory. They support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored, they would still favor applicant's service, their theory of support being that service might be interrupted again in the future.

29. The Broyhill Company has a plant at Dakota City, Nebr., six miles south of Sioux City, Iowa, where it manufactures farm equipment. It sells at numerous points in 43 States, including most of those included in this application. Its gross sales ran between seven and eight hundred thousand in 1956, and greater sales are anticipated in 1957. Raw materials come from a number of points spread throughout 20 States. Rail service is used rather extensively on the bulkier inbound commodities but far less extensively on the outbound traffic. About 60 percent of the out traffic moves in truckload lots. About 80 percent of the outbound traffic is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of a steel workers union went on strike and set up a picket line. Negotiations between Broyhill and the Union have been going on since sometime before the strike was called. As a result of the picket line, there has been no pickup

nor delivery service at the plant since the line appeared. Broyhill admits that it had no transportation problems prior to March 14, 1957, and that its service had been generally satisfactory. It nevertheless supports this application, upon the theory that there could be no guarantee that it would not have another strike.

30. Howard Huff has his place of business at Ord, Nebr., and sells farm machinery in Valley County, Nebr. His principal origin is Hopkins, Minn., but he also receives machines from Chicago, Rock Island, and Moline, Ill. Parts are received from those points, as well as from Kansas City, Mo. Business has been below normal for two years, but in normal times he receives from two to three full loads of machinery yearly and receives parts about twice monthly. He pays freight charges and ordinarily designates routing, although he admits that shippers sometimes do not follow his directions. He complains that, since May 1956, he has had some transportation difficulties. One complaint is that delays have occurred; another is that, contrary to his preference, rail service has been used from Omaha to Ord; and another is that, because of misrouting, excess charges have been applied. He prefers that all his traffic be moved from Omaha to Ord by Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

31. Richard Rowbal, or Ord, sells and erects Quonset buildings in nine Nebraska counties centered on Ord. His principal traffic comes from Detroit, and about 95 percent of it is normally handled by truck carriers. He pays freight charges and ordinarily designates routing beyond Omaha, and his preference is for delivery by Romans. He complains of delays, of the fact that excess charges have been applied in some instances, and of the fact that, contrary to his wishes, deliveries have been made by rail

carriers or by motor carriers other than Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

30. Wheeler Lumber, Bridge & Supply Company has a warehouse at Norfolk, Nebr. It receives raw materials from a number of points in the Midwest and East and ships manufactured products, such as snow fences and corn cribs, largely to Iowa, to some extent to Kansas, Wyoming, and South Dakota, and occasionally to Minnesota. With the exception of South Dakota, practically all outbound traffic goes by truck, and from 75 to 80 percent of the inbound traffic moves by truck. Routing is controlled by Wheeler. On inbound traffic, the practice apparently has been to let shippers select originating carriers but to instruct them to route care of Clark at Omaha. Clark and Abler have been the principal outbound carriers, but from five to six other Norfolk carriers have also been used to some extent. During most of 1955, routing preferences were followed and service was generally satisfactory. Apparently because of labor problems of eastern Nebraska carriers, particularly those of Clark, service has not been satisfactory since late 1955. Complaint was made of delays and of the fact that some shipments came by rail instead of by truck. It was admitted that at least one shipper declined to follow routings prescribed by Wheeler. It supports this application upon the theory that service by applicant in and out of Omaha would enable it to follow its preference in using the Clark service between Omaha and Norfolk.

31. Evidence in opposition to the application was submitted by ten rail carriers, three of which serve Omaha. That evidence tends to show that rail carriers offer and provide standard rail service from and to Omaha in connection with all classes of traffic moving from or to prin-

cipal points throughout the territory of this application. Rail carriers are normally unionized throughout their various classes of employees.

32. About 29 motor common carriers submitted evidence in opposition to the application. All these are authorized to transport general commodities, with exceptions, and to operate principally or entirely over regular routes. At least 11 of those are authorized to serve Omaha. Those 11 include most of the principal motor common carriers at Omaha, such as Watson Bros. Transportation Co., Inc., Union Freightways, Navajo Freight Lines, Inc., The Santa Fe Trail Transportation Company, Prucka Transportation, Inc., and Independent Truckers, Inc. Most of the carriers serving Omaha have terminals there, and many of those are large carriers, operating large, or relatively large, fleets of equipment. Most of those carriers admit some difficulties in handling jointline freight with eastern Nebraska carriers, but all of them insist that, if conditions were normal, they could and would provide good interchange service and good highway service. All of them declare that, except for conditions not due to their initiative nor desire, they have been ready, able, and willing to provide service for all traffic offered by shippers or connecting carriers. For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy is to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers. It was explained that, where picket lines exist, there might still be difficulties in interchanging traffic in the usual and normal methods of interchange. All fair indications are that, under the leadership of these large and progressive carriers, other Omaha trunkline car-

riers will strive to restore to normal their carrier relationships and interchange practices at Omaha.

33. All the evidence submitted by carriers in opposition has been studied and weighed. The evidence for rail carriers shows that standard, normal rail service is available at Omaha and that rail carriers are ready and able to provide service for all traffic offered. While no serious attempts were made to show that rail service, as such, had been or would be inadequate, the trend of the testimony is to the effect that a sufficiency of motor service is and would be needed from and to Omaha. Actually, the problem here is not based on rail service but is based only on motor service. Rail service can therefore be dismissed from the problem.

34. The trunkline motor carriers, as a whole, have always been willing to provide service from and to Omaha, for traffic originating at or destined to Omaha, as well as for traffic received from or delivered to connecting lines at Omaha. They have also had the ability to provide a sufficiency of service of a quantity and quality, which, if freely and fully available, could have and would have met all the reasonable and well-founded transportation requirements for motor service asserted on this record. Were it not for the effects of union pressure upon these carriers, there would have been no material problem to complain of and there would be no problem here to consider. No matter how this problem is viewed, it has but one origin—labor pressure. If the labor effects were removed from this problem, no problem of any appreciable substance would remain. In that situation, the question is whether a grant of authority should be made to meet and overcome the effects of labor difficulties.

35. In these circumstances, the conclusion is that the application should be entirely denied. Most of the Omaha trunkline carriers have heavy investments in equipment and facilities and have large or relatively large employ-

ment rolls. Everybody knows that labor unions are not like Boy Scout organizations and that labor strikes or other labor difficulties can have seriously damaging or even disastrous effects upon a business and its employees. For example, one carrier in opposition has had a labor problem at its Minneapolis, Minn., terminal since April 21, 1952, and has not provided any direct service at that important terminal point since September 15, 1952. With those important factors influencing their judgment, and in view of the labor contracts they had signed, it was not illogical nor unbusinesslike to more or less go along with their union or at least not to get in trouble with it. As a matter of fact, many of the carriers were advised by a labor affairs consultant. There is no basis for finding that these carriers were negligent or that they were not diligent in meeting this problem, because they did just about what any reasonable and prudent business man would have done in the face of these union activities.

36.—Even though one of the stated objects of the national transportation policy is to encourage fair wages and equitable working conditions, the Commission has been given no power to settle labor problems or even to influence them.

37.—It is obvious that it would be unwise to attempt to use the certificate provisions of the act to compel carriers to cross picket lines or to defy or ignore the actual or implied threats of their recognized union. In fact, that action could not be justified by anything in the act.

38.—The trunkline carriers have union contracts. The eastern Nebraska carriers are for the most part small or relatively small business men. Most of them are obviously opposed to unionization of their business. Their Commission has no authority nor means of solving that problem. If, as some eastern Nebraska carriers imply, the National Labor Relations Board does not offer a solution to that problem, then it obviously is a problem that only the Legis-

lative Branch of the Federal Government could solve. Certainly, this Commission is in no position to solve it.

39.—The principle recommended for application to this particular proceeding can be stated in this way: To the extent that the interchange and service defects and inadequacies complained of have been actually due to labor difficulties, and if, as to those difficulties, the carriers immediately affected have exercised such diligence and prudence as would normally be exercised by a business man faced with such difficulties, then, and to that extent, their services and interchange practices will not be considered inadequate for public convenience and necessity purposes.

40.—When that principle is applied here, it must be found that, so far as labor difficulties have affected interchange practices and services, the trunkline carriers are entitled to a protective finding.

41.—When that conclusion is made, there is nothing much left upon which a finding of public necessity could be based. Denial of the application must therefore be recommended.

42.—In view of that conclusion, there is no necessity of recommending a finding on the subjects of fitness and ability.

43.—Nothing said here is intended in any way to affect the application pending for authority over regular routes.

44.—The examiner finds that applicant herein has not proved that public convenience and necessity require the operation for which authority is sought and that consequently this application should be denied.

In view of the findings, the examiner recommends that the appended order be entered.

By Michael B. Driscoll, Examiner.

(Signature) MICHAEL B. DRISCOLL.

Recommended by Michael B. Driscoll, Examiner.

(Signature) MICHAEL B. DRISCOLL.

## ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of ..... A. D. 1957.

No. MC-116067 (Sub-No. 2).

NEBRASKA SHORT LINE CARRIERS, INC. COMMON CARRIER APPLICATION.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

*It is ordered*, That said application be, and it is hereby, denied.

*And it is further ordered*, That this order shall be effective on

By the Commission, division 1.

HAROLD D. McCOY,
*Secretary.*

(Seal)

## APPENDIX E.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

| | |
|---|---|
| Ross M. Madden, Regional Director of the Thirteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Petitioner,* *vs.* Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Respondent.* | Civil No. 61 C 960. |

### PETITION FOR INJUNCTION UNDER SECTION 10 (l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

*To the Honorable, the Judges of the United States District Court for the Northern District of Illinois:*

Comes now Ross M. Madden, Regional Director of the Thirteenth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10 (l) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 160 (l); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the

Board on charges alleging that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i) and (ii), subparagraphs (A), (B), and (D) of the Act. In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Thirteenth Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10 (l) of the Act.

3. (a) On or about June 1, 1961, Wilson & Co. (herein called Wilson), pursuant to provisions of the Act, filed a charge with the Board alleging that Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (4) (i) and (ii), subparagraphs (A) and (B), of the Act. A copy of said charge is attached hereto as Exhibit 1 and made a part hereof.

(b) On or about June 1, 1961, Swift & Company, Meat Packing Plant, Swift & Company, Sales Units (divisions of Swift & Company) and Armour and Company (herein called Swift Plant, Swift Sales and Armour, respectively), pursuant to provisions of the Act, filed separate charges with the Board alleging that respondent, a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (4) (1) and (2), subparagraphs (A) and (D) of the Act. Copies of said charges are attached hereto as Exhibits 2 through 7.

4. The aforesaid charges were referred to petitioner as Regional Director of the Thirteenth Region of the Board.

5. Upon the basis of the following, petitioner has reasonable cause to believe that said charges are true, and that a complaint of the Board based on said charges should issue against respondent pursuant to Section 10 (b) of the Act. More particularly, petitioner has reasonable cause to believe, and believes, that respondent is a labor organization within the meaning of Sections 2 (5), 8 (b) and 10 (l) of the Act, and that said respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8 (b) (4) (1) and (2), subparagraphs (A), (B) and (D) of the Act, affecting commerce within the meaning of Sections 2 (6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal offices in Chicago, Illinois, and at all times material herein has been engaged within this judicial district in transacting business and in promoting and protecting the interests of its employee members.

(c) Wilson, Swift Plant, Swift Sales and Armour, each is engaged, at various locations in the Chicago, Illinois area and in various other locations in the United States, in the processing and/or wholesale distribution of meat and meat products. In the operation of their businesses, Wilson, Armour and Swift & Company each annually receives and ships meat and meat products, valued at in excess of $50,000 across State lines.

(d) Nebraska Short Lines and Frozen Food Express (herein called Nebraska and Frozen, respectively) are engaged at Omaha, Nebraska and Dallas, Texas, respectively, in the interstate transportation of freight by motor carrier. Nebraska and Frozen each annually receives in

excess of $50,000 for the transportation of goods and materials across State lines.

(e) In the course of their businesses, Nebraska and Frozen regularly transport with the use of their own over-the-road truck drivers meat and meat products into the Chicago city limits for Wilson.

(f) At all times material herein, respondent has had a dispute with Nebraska, Frozen and other carriers who are not signatories to the "Central States" or other "Over-The-Road Teamster Motor Freight Agreement."

(g) At no time material herein has respondent been certified by the Board as the collective bargaining representative of any of the over-the-road drivers of Armour, Swift Plant or Swift Sales engaged in making retail store door deliveries within the Chicago city limits and at no time material herein has the Board issued an order directing Armour, Swift Plant or Swift Sales to bargain with respondent as the representative of said employees.

(h) At all times material herein, Armour, Swift Plant and Swift Sales have assigned the work of making retail store door deliveries within the Chicago city limits referred to in subparagraph (g) above to their own respective employees who are members of, or represented by other labor organizations and who are not members of, or represented by respondent.

(i) Since prior to June 1, 1961, respondent has demanded that Wilson, Swift Plant, Swift Sales and Armour enter into separate similar contracts containing a clause, namely "Article XXXIII," and an "Addendum to Agreement" which would, among other things, require each said employer to cease doing business with other persons who are not signatories to similar contracts with respondent. Said Article XXXIII and Addendum to Agreement provide as follows:

ARTICLE XXXIII. EXTRA EQUIPMENT.

Livestock, meat and meat products for delivery by truck to a distance not exceeding 50 miles from the Chicago Stock Yards, whether to final destination or point of transfer, shall be delivered by the company in their own equipment, except when there is a lack of equipmeut at individual plants or branches, and then a cartage company who employs members of Local No. 710 will be used. Employer agrees to do all possible to use own equipment at all times.

ADDENDUM TO AGREEMENT.

It is agreed by and between the employer and the union that the following addendum shall be a part of the collective bargaining agreement in effect between the employer and the union. The employer agrees that all meat and meat products which originate with the employer for truck shipment into and out of the Chicago city limits will be done by a certificated carrier who is a party to the Central States or other Over-The-Road Teamster Motor Freight Agreement.

All local overflow cartage shipments of meat and meat products originating with the employer in Chicago will be transported by cartage companies who are parties to the collective bargaining agreement referred to above.

Company owned or company leased equipment is exempt from this addendum except that employer over-the-road drivers will not be permitted to make retail store door deliveries within the Chicago city limits. Leased equipment leased directly to the company will be considered the same as employer owned equipment.

(j) Also, since prior to June 1, 1961, respondent has demanded that Swift Plant, Swift Sales and Armour assign the delivery work referred to in subparagraphs (g) and (h) above, to employees who are members of, or repre-

sented by, respondent rather than to employees who are members of, or represented by other labor organizations, and who are not members of, or represented by respondent. Swift Plant, Swift Sales and Armour have refused to accede to said demands.

(k) In furtherance of its dispute with Nebraska and Frozen, as set forth in subparagraph (f) above, and in furtherance of its demand that Wilson enter into the contract and Addendum to Agreement referred to in subparagraph (i) above, respondent, since on or about June 1, 1961, has engaged in a strike or has picketed the premises of Wilson.

(l) In furtherance of its demands set forth in subparagraphs (i) and (j) above, since on or about June 1, 1961, respondent has engaged in a strike or has picketed the premises of Swift Plant, Swift Sales and Armour.

(m) As a result of respondent's acts and conduct aforesaid, the employees of Wilson, Swift Plant, Swift Sales and Armour have refused to perform services for their respective employers, and, as a consequence, deliveries of meat and meat products in the Chicago, Illinois area have been stopped.

(n) By the acts and conduct set forth in subparagraphs (k), (l) and (m) above, respondent has engaged in, and has induced and encouraged individuals employed by Wilson, Swift Plant, Swift Sales, Armour and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and have threatened, coerced and restrained Wilson, Swift Plant, Swift Sales, Armour, and other persons engaged in commerce or in industries affecting commerce.

(o) Objects of the acts and conduct of respondent set forth in subparagraphs (k), (m) and (n), as pertains to Wilson's employees only, were and are to (1) force or require Wilson to cease doing business with Nebraska, Frozen, or any other employer who is not a certificated carrier signatory to the Central States or other Over-The-Road Teamster Motor Freight Agreement, and (2) to force or require Wilson, or any other employer, to enter into a contract which would require Wilson, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Wilson, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using selling, transporting, or otherwise dealing in any of the products of any other employer, or doing business with any other person.

(p) Objects of the acts and conduct of respondent set forth in subparagraphs (l), (m) and (n), except as pertains to Wilson's employees, were and are to (1) force or require Swift Plant, Swift Sales, Armour, or any other employer, to enter into a contract which would require Swift Sales, Swift Plant, Armour, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Swift Plant, Swift Sales, Armour, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or doing business with any other person; and (2) to force or require Swift Plant, Swift Sales and Armour to assign the work of making retail store door deliveries within the Chicago city limits to employees who are members of, or represented by respondent, rather than to employees who are not members of, or represented by, respondent.

6. It may fairly be anticipated that, unless enjoined, respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (k), (l), (m) and (n) above, or similar or like acts and conduct in violation of Section 8 (b) (4) (1) and (2), subparagraphs (A), (B) and (D) of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10 (l) thereof, that, pending final disposition of the matters involved herein pending before the Board, respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

Wherefore, petitioner prays:

1. That the Court issue an order directing respondent to appear before this Court, at a time and place fixed by the Court, and shew cause, if any there be, why an injunction should not issue enjoining and restraining respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it or them, pending the final disposition of the matters involved herein pending before the Board, from:

(a) Picketing at or in the vicinity of the premises of Wilson, Swift Plant, Swift Sales or Armour.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Wilson, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, mate-

rials, or commodities or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Wilson, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Wilson (1) to cease doing business with Nebraska, Frozen or any other employer who is not a certificated carrier signatory to the Central States or other Over-The-Road Teamster Motor Freight Agreement, and (2) to force or require Wilson, or any other employer, to enter into a contract which would require Wilson, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Wilson, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or doing business with any other person; and

(c) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Swift Plant, Swift Sales, Armour, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Swift Plant, Swift Sales, Armour, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is (1) to force or require Swift Plant, Swift Sales, Armour, or any other employer, to enter into a contract which would require Swift Plant, Swift Sales,

Armour, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Swift Plant, Swift Sales, Armour, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or doing business with any other person; and (2) to force or require Swift Plant, Swift Sales and Armour to assign the work of making retail store door deliveries within the Chicago city limits to employees who are members of, or represented by, respondent, rather than to employees who are not members of, or represented by, respondent.

2. That upon return of said order to show cause, the Court issue an order enjoining and restraining respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Chicago, Illinois, this 5th day of June, 1961.

Telephone: CEntral 6-9660.

/s/ Ross M. Madden,
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